Supreme Court, U.S.
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No. 85-1976

In The

Supreme Court of the United States

October Term, 1986

ROGER FRANCIS DYKES, SR., AND
ROGER FRANCIS DYKES, JR.,

Petitioners,

v.

DIANA CHRISTINA DYKES AND
AARON M. DYKES, a minor child by his next friend,
Diane C. Dykes, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Facts showing that the parties to an allegedly illegal juvenile dependency order merely discussed the procedure necessary to obtain the order prior to said procurement are insufficient to show a corrupt conspiracy actionable under 42 U.S.C. § 1983, as a matter of law.

2. Summary judgment granted by a federal district court judge who has reviewed all pleadings, depositions, and affidavits in the subject case and the related case should be upheld where the party opposing the supported motion for summary judgment fails to comply with Federal Rule of Civil Procedure 56(e) by not documenting specific genuine issues of fact for trial, and where the Eleventh Circuit Court of Appeals erroneously looks to the allegations of the amended complaint rather than to the record evidence to determine if a trial is to take place, thus departing from the essential requirements of the law.

3. Allegations of a corrupt conspiracy to deprive parties of their civil rights in a child custody matter when the result of the conspiracy was an allegedly illegal temporary order are insufficient to sustain a cause of action under section 1983 when state tort remedies provide an adequate remedy for any alleged abuse.

LIST OF PARTIES

A. Those parties listed in the caption of this case.

B. The following parties were appellees with petitioners in the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Anthony J. Hosemann, Florida Circuit Court Judge, Juvenile Division;

2. Thomas A. Weinberg, Employee of Florida Department of Health and Rehabilitative Services; and

3. Kenneth W. McIntosh, private attorney for Roger F. Dykes, Jr., in Florida divorce action.

C. Supreme Court Rule 28.1 is inapplicable.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Roger Francis Dykes, Sr., and Roger Francis Dykes, Jr., respectfully pray that a Writ of Certiorari issue to review the decision rendered in this case by the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 743 F.2d 1488 (11th Cir. 1984), appears as Appendix A at 1. (Hereinafter referred to as *Dykes I.*)

The opinion of the United States Court of Appeals for the Eleventh Circuit, sitting en banc, reported at 776 F.2d 942 (11th Cir. 1985) (en banc), appears as Appendix C at 40. (Hereinafter referred to as *Dykes II.*)

The opinion of the United States Court of Appeals for the Eleventh Circuit on remand from the en banc court and on rehearing, reported at 783 F.2d 1000 (11th Cir. 1986), appears as Appendix D at 70. (Hereinafter referred to as *Dykes III.*)

The judgment of the Eleventh Circuit appears as Appendix E at 76.

The District Court memorandum opinion, reported at 564 F.Supp. 536 (M.D. Fla. 1983), appears as Appendix F at 78.

The opinion of the Fifth District Court of Appeal of Florida, reported as *Dykes v. Dykes,* 395 So.2d 188 (Fla.

5th DCA), *review denied*, 402 So.2d 609 (Fla. 1981), appears as Appendix H at 99.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit, on remand from en banc court and on petitions for rehearing, were rendered in this case on March 3, 1986. This Petition for Writ of Certiorari was filed within ninety (90) days of March 3, 1986, as is required by 28 U.S.C. § 2101(c), and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

1. 42 U.S.C. § 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Fed.R. Civ. P. 56(e) states in part:

> . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

STATEMENT OF THE CASE

I. The Proceedings Below

In this section 1983 conspiracy action, plaintiffs alleged deprivation of procedural and substantive due process rights, and denial of equal protection under the law, arising from a juvenile dependency order assigning temporary custody of the child, Aaron Dykes, to Roger Dykes, Jr. Plaintiffs alleged that the participants in the "conspiracy" were the defendants: Judge Hosemann, who signed the dependency order; Thomas Weinberg, a state welfare official; Ken McIntosh, the divorce attorney for the husband, Roger Dykes, Jr.; and the husband and his father, Roger Francis Dykes, Jr. (Buzzy) and Roger Francis Dykes, Sr. (Judge Dykes), respectively.

The federal trial judge, George Young, granted motions to dismiss as to the juvenile judge, Hosemann, and the husband's divorce counsel, Ken McIntosh, and granted motions for summary judgment as to the remaining parties. The trial court had also dismissed the plaintiff child from the suit.

On appeal to the United States Court of Appeals for the Eleventh Circuit, in *Dykes I*, the first panel decision,

the court noted that plaintiffs had abandoned their equal protection and substantive due process claims. In a two to one opinion, the panel found that the plaintiffs stated a section 1983 procedural due process claim, reinstated the suit against all parties defendant, and rejoined Aaron Dykes as a plaintiff.

A dissenting opinion was filed by Judge James C. Hill, noting that "although I assume that appellant's allegations of conspiracy are sufficient to state a claim under section 1983, I dissent from the majority because it is clear to me that these allegations are unfounded and without support on the record of this case; and therefore that the dismissal of all defendants by the district judge was proper." 743 F.2d at 1501, Appendix A at 27.

The en banc Eleventh Circuit reheard the case and affirmed the district court's dismissal of the action against the state juvenile division judge on grounds of judicial immunity. The en banc majority addressed no other issues. Three judges dissented, urging that the cause should be dismissed because adequate state remedies existed to protect the plaintiffs' procedural due process interests. A fourth judge dissented to the judicial immunity decision of the majority.

In *Dykes III*, on remand from the en banc court and on rehearing, the panel reinstated its initial opinion in *Dykes I* except for the judicial immunity issue decided by the en banc court, and on rehearing affirmed the dismissal of Ken McIntosh, divorce counsel for Buzzy Dykes. Judge Hill renewed his dissent, expanding on the lack of record support for any factual issue requiring resolution by trial.

The opinion of the panel in *Dykes III* reinstating the reversal of the summary judgments in *Dykes I* as to Roger Francis Dykes, Jr. and Sr., as well as the *Dykes I* opinion, are the matters for which the petitioners seek a Writ of Certiorari in this Court.

II. Statement of Relevant Facts

Plaintiff, Diana Dykes, and defendant/petitioner, Roger Francis "Buzzy" Dykes, Jr., developed marital difficulties in 1977. In November of that year, Buzzy and their only child, Aaron, traveled from their home in Pennsylvania to his parents' home in Florida. Diana was invited to come, but she declined to do so. Buzzy's father, Roger F. Dykes, Sr., was a Brevard County Circuit Court Judge.

Plaintiffs allege that Buzzy Dykes and his father formulated a plan to obtain a dependency order giving custody of Aaron to Buzzy. Judge Dykes is alleged to have telephoned Judge Anthony Hosemann in November of 1977 seeking procedural information about juvenile petitions. Judge Hosemann, a state circuit court judge assigned to juvenile cases, is alleged to have advised Judge Dykes that a dependency petition would have to be prepared by the Florida Department of Health and Rehabilitative Services (HRS).

Judge and Buzzy Dykes approached local HRS officials that evening to request assistance with obtaining a dependency order. The HRS employee declined to prepare such a petition on behalf of HRS but offered to aid the Dykeses in preparation of such a petition, to be presented in the name of Roger Dykes, Jr., rather than in the name of HRS. Section 39.04(1)(d), Florida Statutes

(1977) (quoted at 564 F.Supp. at 542, Appendix F at 89), required HRS to inform the Dykeses they could file a petition on their own, and the uncontroverted affidavits of defendant Weinberg and three other HRS employees showed it was customary for HRS to assist in the preparation of such petitions. 743 F.2d at 1504, Appendix A at 34 (Hill, J., dissenting). The primary reason stated in the petition was a need to protect the child, Aaron, from being abducted from Florida by persons acting on behalf of Diana Dykes.

The following day, Judge Hosemann, after reviewing the petition, signed an order declaring Aaron to be a "dependent child," recognizing temporary custody in Buzzy and restraining against removal of the child from Florida. Diana Dykes was not served with a summons and a copy of the petition prior to the entry of the dependency order.

Within a week after the order, Diana came to Florida and the couple appeared to have reconciled. However, after less than two months, Diana Dykes left Florida with Aaron, taking a plane to Maryland after leaving a note to the effect that they were at the beach. Buzzy Dykes filed for divorce, was given temporary custody, and was ultimately awarded permanent custody of Aaron by Circuit Court Judge Richard Muldrew of the division handling domestic relations cases. Diana Dykes received proper notice and appeared and counterclaimed in the divorce proceedings. It is apparent from reading *Dykes I* and *II* that the sole acts considered by the Eleventh Circuit to support its decisions were those on the two days in November 1977 when the initial juvenile dependency order was sought and obtained.

The Eleventh Circuit opinions appear to conclude that Florida's dependency statute was inapplicable to the circumstances existing between Diana and Buzzy Dykes. Diana Dykes never appealed the dependency order, although she was on actual notice that it had been signed within a day after the order was obtained and had legal counsel acting on her behalf at that time. She was served with a copy of the order at the commencement of the dissolution proceeding.

In the state dissolution proceedings, following final judgment, Diana Dykes raised the issue of alleged improprieties arising from Judge Dykes' position as a state circuit judge. The Florida Fifth District Court of Appeal affirmed the trial judge's conclusion that no improprieties had occurred. Failing to win review in the Florida Supreme Court, Diana Dykes brought this section 1983 conspiracy action in federal district court.

Judge and Buzzy Dykes moved for summary judgment and supported their motion with deposition testimony, affidavits, and memoranda of law. Diana Dykes at no time complied with Federal Rule of Civil Procedure 56(e) in that she never, by affidavit or otherwise, set forth specific facts showing genuine issues for trial. The federal trial judge concluded on Judge and Buzzy Dykes' motion for summary judgment that Diana Dykes had failed to show any substantial question of fact as to the alleged conspiracy and that the pleadings and evidence failed to support her allegations. The Eleventh Circuit reversed, stating that the plaintiff's amended complaint stated a cause of action.

———o———

ARGUMENT

The gravamen of the plaintiffs' amended complaint is that she and her child were deprived of a right to procedural due process when the defendants in this action allegedly acted in concert to effect an illegal temporary child custody order. The amended complaint may have been sufficient to plead such a case against the Dykeses, but there was no evidence to support the plaintiffs' claims. None of the evidence before the lower tribunals shows that the defendants did anything other than to discuss the procedure necessary to petition for a dependency order, to then prepare the petition, and obtain the temporary order. These facts are insufficient to establish any sort of corrupt conspiracy cognizable under section 1983.

In any allegedly tortious situation where more than one person is involved in the acts alleged to be tortious, the parties must almost always have discussed the actions. Yet such mere contact between the parties is insufficient to survive a motion to dismiss or for summary judgment.

In *Cole v. Gray,* 638 F.2d 804 (5th Cir.), *cert. denied,* 454 U.S. 838 (1981), the Fifth Circuit found that evidence that the defendants in a section 1983 conspiracy case merely were in contact with each other was insufficient to defeat a defense motion for summary judgment. The *Cole* court specifically noted there was

> no buttressing proof of the actual nature of the information conveyed. No proof of the making or accepting of statements known to be false exists in the record. Finally, there is the discharge itself [from a National Guard command position, which was the ultimate act of the alleged conspiracy]. These ele-

> ments, *murky allegations as to motive plus mere contact plus the fact of discharge are linked together by speculations and conclusory allegations. The evidence was wholly insufficient to raise a fact issue for trial on the conspiracy complaint.*

638 F.2d at 811 (emphasis added) (quoted in *Dykes v. Weinberg,* 564 F.Supp. 536, 544, Appendix F at 95 (M.D. Fla. 1983)). This language was expressly relied upon by the district court in this case to conclude that there was insufficient evidence of a conspiracy to survive Petitioners' motion for summary judgment. See Appendix F at 95.

As in *Cole,* plaintiffs are simply unable to show anything more than contact between the defendants. The allegata and evidence presented to the district court on the motions for summary judgment regarding the specific content of the communications between the defendants are, in essence, the same as no evidence at all, since the communications fail to raise any factual issue as to the alleged conspiracy. Communications as to how to file a juvenile petition under Florida's dependency statute are simply not conspiratorial communications. Rather, HRS is duty bound by statute to inform persons such as Judge and Buzzy Dykes of their right to independently file a petition, and it was customary for HRS to assist such persons in preparing dependency petitions.

The evidence, taken in the light most favorable to the plaintiffs, fails to show a corrupt conspiracy to get the order. The fact that, in retrospect, it appears the order may have been procedurally defective, may go to show that the plaintiffs may have had a remedy by way of appeal or under state tort law for abuse of process, but the totality

of the circumstances is simply insufficient to establish any question of fact as to a corrupt conspiracy. Furthermore, Diana Dykes failed to comply with Federal Rule of Civil Procedure 56(e) which *requires* the party opposing a motion for summary judgment to set forth specific facts showing that there is a genuine issue for trial.

After reviewing all of the depositions, affidavits, and pleadings in the subject section 1983 case and the entire state court divorce file, the district court judge concluded that there was no proof of, nor a genuine issue for trial as to, the alleged conspiracy. The Eleventh Circuit panel in *Dykes I* erred in reversing. In so doing, the panel created conflict with the Fifth Circuit in *Cole,* and the Fifth Circuit's subsequent opinion, after the Eleventh Circuit was created, in *Arsenaux v. Roberts,* 726 F.2d 1022 (5th Cir. 1982). In *Arsenaux,* the husband in a dissolution action sued under section 1983, alleging conspiracy. The court held:

> A conspiracy cannot be divined from allegations of trial errors, the ex parte amendment of the complaint after improper communications, and the assessment of court costs. To establish a cause of action based on conspiracy a plaintiff must show that the defendants agreed to commit an illegal act. The conspiracy allegations made by Arsenaux are conclusory, and more than a blanket of accusation is necessary to support a section 1983 claim.

726 F.2d at 1024 (citations deleted). Thus, even when "improper communications" are alleged in the complaint, those allegations are insufficient to state a claim of conspiracy, vis-a-vis a motion to dismiss. Logically, if the allegation of same is insufficient, then proof of same, and

nothing more, for purposes of summary judgment is likewise insufficient to survive a motion for summary judgment. *See also Aldabe v. Aldabe,* 616 F.2d 1089 (9th Cir. 1980) ("Appellant's dissatisfaction with the property settlement reached in her prior divorce proceedings, and her conclusory allegations that the appellees had conspired to prevent her from effectively prosecuting her divorce case, are insufficient to support a section 1983 claim." 616 F.2d at 1092); *Slotnick v. Staviskey,* 560 F.2d 31 (1st Cir. 1977), *cert. denied,* 434 U.S. 1077 (1978).

Clearly, the Eleventh Circuit, in *Dykes I,* has committed fundamental error in overriding the trial judge's careful analysis of the factual record without pointing to specific factual issues, and has created conflict with decisions in the First, Fifth, and Ninth Circuits regarding the sufficiency of allegations and proof.

Furthermore, the Eleventh Circuit by its decisions has rewritten Rule 56(e) of the Federal Rules of Civil Procedure. No longer in the Eleventh Circuit must the opponent of a supported motion for summary judgment herself point to and document the existence of genuine issues for trial. Rather, in the Eleventh Circuit, alone, the allegations of an amended complaint, argument in appellate briefs, and oral argument on appeal provide "facts" sufficient to hold a jury trial. This is a departure from the clear requirement of the law which should be remedied.

A more fundamental threat to the administration of justice is the fact that the decisions of the Eleventh Circuit in this action allow plaintiffs to proceed to trial on an action which, if proper in any court, belongs in the

state courts. A domestic relations case such as this is simply not the sort of case for which section 1983 was intended to provide a remedy. The plaintiffs were afforded full due process after the initial, allegedly erroneous, temporary custody order. They still have available full due process to pursue a claim for abuse of process in the state courts. No more process is due, and it is therefore impossible to understand how plaintiffs may sustain a claim in federal court for deprivation of some constitutional right without due process of the law.

This was the conclusion of the Seventh Circuit in *Ellis v. Hamilton,* 669 F.2d 510 (7th Cir.), *cert. denied sub nom., Ellis v. Judge of Putnam Circuit Court,* 459 U.S. 1069 (1982). In that case, the de facto "parents" of four children (actually the children's grandmothers, one the biological mother of the children's father, the other the father's aunt and his adoptive mother) alleged violation of due process rights in a custody proceeding. State welfare workers removed the children from the "parents'" custody and undertook to have the children adopted without proper notice to the plaintiffs, who were thwarted in their own attempts to adopt the children. The plaintiffs sought a decree granting them visitation rights with the children, and damages for the deprivation of the custody and companionship of the children. The court held:

> If due process were denied *every time local officials blundered,* then any plaintiff in the state court who was asserting a right within the broadly defined categories of liberty or property and who lost his cause *because the judge made an error* could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts.

> Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings—unless the defendants act with such ruthless speed that the machinery of correction cannot be brought into play in time.
>
> Therefore, if by design or in effect Indiana law placed the plaintiffs completely at the mercy of county welfare and judicial officers who misbehaved as alleged in the complaint, these allegations would raise a serious due process claim. *But instead the law of Indiana provides a variety of remedies by which to correct, and promptly, this kind of misbehavior.*

669 F.2d at 514 (emphasis added). The court then enumerated a variety of remedies, including mandamus, an action in fraud, and resisting surrender of the children thereby forcing the welfare officials to use legal process. The *Ellis* plaintiffs availed themselves of none of these remedies. The court also noted that the plaintiffs still had remedies available, observing that plaintiffs had intervened in an action against the adoptive parents of one of the children accused of abuse and neglect.

The situation is legally similar in this case. In fact, Ms. Dykes has availed herself of some of the remedies provided under Florida law. Temporary and permanent custody of Aaron Dykes was fully litigated in the divorce action. She raised the claim that Judge Dykes exerted undue influence in the divorce proceedings before Circuit Court Judge Richard Muldrew in her motion for rehearing or new trial after the final judgment in the divorce action. Subsequently, the Florida Fifth District Court of Appeal held:

> The fact that appellee's father was a judge in the same circuit was known to all parties and the trial judge before, during, a· . after the trial of this cause. *No change of venue was ever requested. At no time did appellant ever ask the judge to recuse himself* or even suggest that the trial judge might be embarrassed or otherwise inhibited in his rulings.
>
> The trial judge openly discussed the matter with the parties and their attorneys *and at the beginning of the trial offered to recuse himself* if either party felt that because appellee's father was a local judge a fair trial would not be had. No one took him up on that offer. There were no allegations of impropriety directed at appellee's father—*only innuendos, insinuations, and conclusions.* Moreover, and most important to our decision, is *the complete absence of any allegation or intimation that there was any attempt to influence the trial judge or that the trial judge was in fact influenced by any consideration outside of the record.*

Dykes v. Dykes, 395 So.2d 188, 190, Appendix H at 102 (Fla. 5th DCA), *review denied,* 402 So.2d 609 (Fla. 1981) (emphasis added). In other words, Ms. Dykes raised the question of improprieties surrounding the entire custody battle, including the alleged impropriety of the dependency order (as the dissenter in *Dykes v. Dykes* noted, 395 So.2d at 191, Appendix H at 103 (Sharp, J., dissenting in part)), and the Florida court found no basis for altering the final judgment in the divorce, the ultimate outcome of the battle which began with the alleged conspiracy now in the federal courts. The court's finding that she was entitled to no relief is hardly the equivalent to denying her due process. Also, although Ms. Dykes did not receive formal service of the dependency order within Florida's 30-day time limit to file an appeal, she had the rem-

edy available of having the order reissued so as to permit her a "new" 30 days within which to appeal. *See Snelson v. Snelson,* 440 So.2d 477 (Fla. 5th DCA 1983); *Gibson v. Bruce,* 381 So.2d 344 (Fla. 5th DCA 1981); *Woldarsky v. Woldarsky,* 243 So.2d 629 (Fla. 1st DCA 1971). She never attempted to appeal the order, even though she was on actual notice of same within a day of the order being signed and was in constant contact with her attorneys at that time. Nor did she pursue any other remedies, such as collaterally attacking the dependency order.

All that exists in this case, factually, is an alleged error in the procedure utilized to achieve a determination of dependency and temporary custody. No actual harm occurred to Ms. Dykes or to Aaron as a result of the juvenile dependency order. Buzzy Dykes had the right as a parent to custody of Aaron, and Diana Dykes was never punished for any violation of that order. Any such error was cured in the subsequent divorce proceeding and state appeal. Ms. Dykes' remedy, if any, for the initial alleged error is in the state courts, in an action for abuse of process. This was the conclusion of the dissenters in *Dykes II,* the en banc opinion of the Eleventh Circuit. That three members of the court found sufficient merit to the conclusion is indicative of the substantial nature of the issue, requiring resolution by this Supreme Court.

Petitioners have urged throughout this federal action that the state courts have already resolved the issues raised below. *See, e.g.,* § IV.B. of *Dykes I,* Appendix A at 24-26. The dissenters in *Dykes II* also found merit in extending the rationale of *Parratt v. Taylor,* 451 U.S. 527 (1981), to the instant matter. *Parratt,* and the better-reasoned cases as noted and cited by the dissenters in

Dykes II, deny relief under section 1983 when adequate state remedies exist to give a plaintiff the process due him. This Court extended the rationale of *Parratt* to *intentional* deprivations of constitutional rights in *Hudson v. Palmer*, 468 U.S. 517 (1984), and receded from recognizing any section 1983 action for *negligent* conduct in *Daniels v. Williams*, 106 S.Ct. 662 (1986).

The distinction between deprivation of property rights and injury to life or liberty should not prevent application of *Parratt*. In *Daniels*, this Court did not distinguish between injuries to life, liberty or property. 106 S.Ct. at 666. An injury to a property right is just as much an intrusion on constitutionally protected rights as is an injury to a life or liberty interest. It necessarily follows that a rule governing protection of property rights must equally apply to life and liberty rights. See cases cited in the dissent in *Dykes II*, 776 F.2d at 942, Appendix C at 61. *Cf. Ingraham v. Wright*, 430 U.S. 651 (1977) (considering adequacy of state remedies in liberty case); *Ellis v. Hamilton; Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (adequate state remedies barred federal habeas corpus relief in child custody action).

Extension of the *Parratt* rule to liberty interests was brought before this Court in *Daniels v. Williams*. The lower court decision in that case, *Daniels v. Williams*, 720 F.2d 792 (4th Cir. 1983), expressly determined that *Parratt* applied to negligent deprivation of liberty interests. *Id.* at 794-96. This Court determined that negligent deprivations were not actionable under section 1983, and therefore did not reach the question of extending *Parratt* to liberty interests. The instant case offers an opportunity

for the Court to address this issue in the context of an allegedly intentional deprivation of liberty interests, squarely in conflict with *Ellis v. Hamilton* and the other cases cited in the *Dykes II* dissent.

A further reason compelling review by this Court is that family law is "peculiarly local," *Ellis*, 669 F.2d at 510, and federal courts properly leave most domestic relations cases to be resolved in the state courts. *Id. See also, e.g., Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975) (domestic relations cases generally excepted from diversity jurisdiction). To permit disenchanted litigants who have lost a domestic relations case in the state courts to pursue a section 1983 action in the federal courts, when the state courts provide full and adequate procedural protection and relief for any collateral complaint, is to invite federal intrusion into arcana of state law best left unexplored. *See Ellis*, 669 F.2d at 514 (quoted *supra*).

CONCLUSION

This Court should take jurisdiction and issue a Writ of Certiorari to resolve express conflict created by opinions of the Eleventh Circuit in this case by bringing the Eleventh Circuit in line with the cases of other circuits cited herein, on the issue of the sufficiency of allegations and the requirement of evidence of conspiracy to maintain a section 1983 suit.

A Writ of Certiorari should likewise issue to ensure uniform summary judgment procedure in accordance with Federal Rule of Civil Procedure 56(e) so that only those

cases with demonstrated, genuine factual issues will actually go to trial.

This Court should also take jurisdiction and issue a Writ of Certiorari to resolve the express conflict with *Ellis* and the other cases cited herein and the conflict in principle with *Parratt* and its progeny which would bar a section 1983 suit when state remedies have been adequate and offer further opportunity for relief.

Respectfully submitted,

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APPENDIX A

Diana Christine DYKES, etc.,

Plaintiff-Appellant,

v.

A.J. HOSEMANN, Jr., etc., Thomas A. Weinberg, etc., Roger Francis Dykes, Sr., etc., and Roger Francis Dykes, Jr., etc., Kenneth W. McIntosh, etc., Defendants-Appellees.

No. 83-3347.

United States Court of Appeals,
Eleventh Circuit.
Oct. 11, 1984.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

THORNBERRY, Senior Circuit Judge:

In this § 1983 case, appellant Diana Christine Dykes ("Diana") alleges in essence that the appellees acted to deprive her of her constitutional right to raise her child without due process of law. The district court dismissed the suits against two of the appellees and granted the other three appellees' motions for summary judgment. We reverse and remand to the district court for further proceedings.

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* Honorable Homer Thornberry, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX 2

I. Facts

Diana Dykes and Roger Francis "Buzzy" Dykes, Jr. ("Buzzy") began experiencing marital difficulties in 1977. In November 1977, Buzzy took the couple's only child, three-year-old Aaron Matthew Dykes ("Aaron"), the other appellant, from their Pennsylvania home to the Florida home of Buzzy's father and stepmother, Judge Roger F. Dykes ("Judge Dykes") and Alpine Dykes. The circumstances of this incident are in dispute.

What happened next is not altogether clear either. The appellants contend that Buzzy and Judge Dykes formulated a plan to obtain a colorable court order awarding custody of Aaron to Buzzy. According to the appellants, Judge Dykes, who is a Brevard County, Florida Circuit Court judge, telephoned Judge Anthony Hosemann, Jr., ("Judge Hosemann"), another Brevard County Circuit Court judge then assigned to the Juvenile Court, for advice. Judge Hosemann suggested that Buzzy come to him with a "dependency" petition, and referred Judge Dykes to the Florida Department of Health and Rehabilitative Services ("HRS"), the state social service agency in charge of dependent and delinquent children.

On the evening of November 21, Judge Dykes and Buzzy went to an HRS office and requested assistance in filing a dependency petition. The agency official on duty there, Kendrick Lofback, explained that the Juvenile Court's authority to award custody was restricted to dependent or delinquent children, and Aaron did not qualify:[1]

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1. Under Florida law then in effect, a "dependent child" was a defined term:

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> I told them that I wouldn't be able to help them, you know, that what we had to offer wasn't relevant to their situation, that they needed to get a lawyer and have something done through Circuit Court.

Lofback Deposition at 14.

According to Lofback, Judge Dykes persisted in the request, and Lofback called his supervisor, Thomas Wein-

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(8) "Dependent child" means a child who:

(a) Has been abandoned by his parents or other custodians.

(b) For any reason, is destitute or homeless.

(c) Has not proper parental support, maintenance, care, or guardianship.

(d) Because of the neglect of his parents or other custodians, is deprived of education as required by law, or of medical, psychiatric, psychological, or other care necessary for his well-being.

(e) Is living in a condition or environment such as to injure him or endanger his welfare.

(f) Is living in a home which, by reason of the neglect, cruelty, depravity, or other adverse condition of a parent or other person in whose care the child may be, is an unfit place for him.

(g) Is surrendered to the Department of Health and Rehabilitative Services or a licensed child-placing agency for purpose of adoption.

(h) Has persistently run away from his parents or legal guardian.

(i) Being subject to compulsory school attendance, is habitually truant from school.

Fla.Stats. § 39.01(8) (1977).

In 1978, the Florida State Legislature revised Chapter 39 and it became known as the Florida Juvenile Justice Act, with new sections effective October 1, 1978.

berg, at home, to discuss the matter. Weinberg and Lofback finally agreed to go along with the petition, as long as it was not officially sponsored by HRS. Weinberg concedes that he might have told Lofback to help with the petition because Judge Dykes was a judge.

The next morning Weinberg presented a petition on behalf of Buzzy to Judge Hosemann, alleging as a basis for seeking custody the "real danger" that Diana might try to "abduct" Aaron. Buzzy had signed the petition and Weinberg had notarized it, although Weinberg admits that he did not administer an oath to Buzzy.[2] Buzzy waited outside Judge Hosemann's chambers while Weinberg presented the petition. Judge Hosemann signed the order finding Aaron to be a "dependent child" and awarded custody to Buzzy without any receipt of evidence.[3] Judge Hosemann admits that he had no basis for awarding custody of Aaron to Buzzy other than the fact that his father was a judge and the fact that the petition was presented by an HRS official.

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2. The applicable statute stated that the petition "shall be signed by the petitioner under oath stating his good faith in filing the petition." Fla.Stat. § 39.05(3) (1977).

3. Under the statute, an adjudicatory hearing was required to be held to determine whether or not the child was "dependent" within the meaning of § 39.01(8). Fla.Stat. § 39.09(1) (1977). The determination of dependency was permissible only upon a preponderance of the evidence. *Id.* at § 39.09(1) (b). Furthermore, once a child had been adjudicated a dependent, the court was required to hold a disposition hearing, at which it was to consider a predisposition study presented by an agent of HRS. *Id.* at § 39.09(3). Here, the adjudication and the disposition were combined into one hearing where no evidence was presented.

No summons was ever directed to Diana, as the statute required,[4] nor was Diana ever informed prior to the November 22 proceeding that a custody order would be sought. Buzzy did call Diana after he had obtained the order and inform her that he had a court order preventing Aaron's removal from Florida. Diana did not believe him because she had consulted an attorney who had told her that a court could not award custody or prevent a child's removal from a state unless a divorce action had been commenced.

Shortly after the dependency proceeding, Buzzy, Diana, and Aaron got back together briefly. They closed up their Pennsylvania apartment, returned to Florida, and moved in with Judge Dykes and his second wife,

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4. The statute provided:

> (2) Upon the filing of a petition containing allegations of facts which, if true, would constitute the child therein named a dependent child, delinquent child, or a child in need of supervision, and upon the request of the petitioner, the clerk or deputy clerk shall issue a summons.
>
> (3) The summons shall require the person on whom it is served to appear for a hearing at a time and place specified. The time shall not be less than twenty-four hours after service of the summons. If the child is not detained by an order of the court, the summons shall require the custodian to produce the child at the said time and place. A copy of the petition shall be attached to the summons.
>
> (4) The summons shall be directed to, and shall be served upon, the following persons:
>
> (a) [The child if delinquent];
>
> (b) The parents; and
>
> (c) The legal custodians, actual custodians, and guardians ad litem, if there be any other than the parents.

Fla.Stat. § 39.06 (1977).

Alpine. They soon moved again, this time in with Buzzy's mother, Judge Dykes' ex-wife Marilu.

On approximately January 23, 1978, Diana traveled with Aaron from Florida to her parents' home in Maryland. The circumstances of this move are in dispute.

After Diana left Florida, the Dykes family retained an attorney, Kenneth McIntosh, to help secure Aaron's return to Florida. A meeting was held between Buzzy, Judge Dykes, Judge Hosemann, Weinberg, and another HRS employee in Judge Hosemann's chambers on January 23, 1978. The group allegedly formulated a plan to bring Aaron back to Florida.

The next day, in accordance with the plan, Buzzy filed a petition for dissolution of marriage in Brevard County Circuit Court. The dissolution case was assigned to Judge Muldrew, another judge on the Brevard County Circuit Court bench. Judge Muldrew issued three orders *ex parte:* one granting temporary custody of Aaron to Buzzy and two Requests far Assistance to the Maryland juvenile authorities. Judge Hosemann also issued an *ex parte* order for Aaron's return and requesting the assistance of Maryland authorities. All four orders were based upon and referred to Judge Hosemann's original November 22, 1977 custody order. Each judge ordered Diana to appear in a different court on February 13, 1978 at 10:30 a.m.

On January 30, armed with the Florida orders, Buzzy flew to Maryland and proceeded to the Maryland Circuit Court, where he obtained a custody order requiring Diana to surrender Aaron. That night, accompanied by a Baltimore County Deputy sheriff, Buzzy went to Diana's parents' home, picked up Aaron, and returned to Florida.

This was the first time that Diana received formal notice of the November 1977 custody adjudicated by Judge Hosemann.[5]

In February 1978, Diana flew to Florida to be with Aaron and to appear at the custody hearing before Judge Muldrew. On February 22, 1978, Judge Muldrew ordered HRS to do a social investigation of both parents' suitability as custodians; the study was to be completed within 60 days. The report, which made no custody recommendation, was finally completed almost nine months later, only after Diana's counsel had filed a contempt motion against HRS based on the delay. During all this time, Buzzy had custody of Aaron.

On August 15, 1978, Judge Muldrew issued a final judgment of dissolution of marriage. On February 22, 1979, he granted a permanent custody of Aaron to Buzzy. One of the primary reasons cited by Judge Muldrew for his decision was the fact that Buzzy had been the custodial parent during the past year.

Subsequently, Diana sought post-judgment relief, including the right to take post-trial discovery, on the grounds of judicial impropriety and undue influence in the custody proceedings. All these motions were denied. After her state appeals were denied, she filed this § 1983 action.

In Diana's original complaint, both she and her son Aaron were named as plaintiffs. The four-count com-

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5. By the time Diana received formal notice of the November 1977 custody order, her 30-day period for appealing the order under § 39.14(1) of the Florida Statutes had elapsed.

plaint alleged deprivation of the plaintiffs' constitutional rights in violation of 42 U.S.C. §§ 1983 and 1985 by appellees Judge Hosemann, Judge Dykes, Buzzy Dykes, Thomas Weinberg, Kenneth McIntosh, and Alpine Dykes. Specifically, she claimed that the appellees, individually, and as part of a conspiracy, deprived her of custody of Aaron in violation of her procedural and substantive due process rights and her right to equal protection under the Fifth and Fourteenth Amendments. Chief Judge George C. Young dismissed this original complaint for failure to comply with Federal Civil Rule of Procedure 8(a). The plaintiffs then filed an amended complaint against all previously named defendants except Alpine Dykes.

The district court dismissed the § 1985 actions for lack of an allegation of class-based animus. The appellants do not appeal this decision. The district court also dismissed Aaron as a party plaintiff on the grounds that he had not suffered any damages. The claim against Judge Hosemann was dismissed on the grounds of judicial immunity, and the claim against McIntosh was dismissed for lack of state action and insufficient allegations. The trial court also granted motions for summary judgment filed by Judge Dykes, Buzzy, and Weinberg. Diana and Aaron appeal all these orders.[6]

II. Section 1983 Analysis

At the outset, we address the basis for the appellants' rather novel claim under 42 U.S.C. § 1983.

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6. On appeal, the appellants only argue that their rights to procedural due process were violated by the appellees individually and as part of a conspiracy, and have apparently abandoned their equal protection and substantive due process claims.

APPENDIX 9

Section 1983 provides in pertinent part:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. . . .

Two primary issues in a § 1983 action are (1) whether the defendants violated the plaintiffs' constitutional rights, and (2) whether such violation was under color of state law. *Scott v. Dixon,* 720 F.2d 1542, 1545 (11th Cir.1983); *Brown v. Miller,* 631 F.2d 408, 410 (5th Cir.1980).

The gravamen of Diana's complaint and her basis for appeal is that her parental rights were terminated without notice and a hearing by means of an official act of a judge, which was the product of a corrupt conspiracy between the judge and the other appellants. Diana correctly points out that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson,* — U.S. —, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1983). "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." *Id., quoting Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 1393, 71 L.Ed.2d 599 (1982). At a minimum, due process requires timely

notice, in advance of a hearing in which parents' rights to custody are at stake. *Application of Gault,* 387 U.S. 1, 87 S.Ct. 1428, 1447, 18 L.Ed.2d 527 (1967). Furthermore, "before a person is deprived of a protected interest, he must be afforded an opportunity for some kind of hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justified postponing the hearing until after the event.'" *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 97 S.Ct. 2094, 2111, 53 L.Ed2d 14 (1977), *quoting Boddie v. Connecticut,* 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed2d 113 (1971).

The "color of state law" component of § 1983 may be satisfied by showing that an official act of a defendant judge was the product of a corrupt conspiracy involving the judge and other private parties. *Dennis v. Sparks,* 101 S.Ct. 183, 186 (1980). Even if the judge himself is held to be absolutely immune from suit (see section IIB *infra*), the private parties who conspire with the judge act under color of state law for § 1983 purposes. *Id.* at 187.

Here, Diana alleges, and the other parties do not dispute, that Diana was not given notice or a hearing before the dependency adjudication deprived her of custory of Aaron. She also alleges that the dependency adjudication was the product of a corrupt conspiracy between a judge and private parties. We conclude that Diana has at least stated a § 1983 procedural due process claim. Accordingly, we address seriatim the appellees' liability for that claim.

III. The Appellees' Liability

A. Judge Hosemann

The claim against Judge Hosemann was dismissed on the grounds of absolute judicial immunity. It is well established that judges are immune from lawsuits for damages[7] for all judicial acts not taken in the clear absence of jurisdiction. *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978); *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Bradley v. Fisher,* 13 Wall. 335, 20 L.Ed. 646 (1871); *Randall v. Brigham,* 7 Wall. 523, 19 L.Ed. 285 (1868). The appellants here again argue that Judge Hosemann is not immune because (1) some of the acts complained of are nonjudicial in nature, and (2) his judicial acts were taken in the clear absence of jurisdiction.

1. Nonjudicial Acts

The appellants do not contend that Judge Hosemann's participation in the dependency proceeding was not a "judicial act." Rather, they maintain that Judge Hosemann's implicit or explicit agreement prior to the dependency proceeding to grant Buzzy custody was a nonjudicial act.[8]

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7. We note that the Supreme Court this term has held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer. *Pulliam v. Allen,* — U.S. —, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984).

8. The appellees argue that the appellants failed to raise the nonjudicial act theory in the district court. The appellees are mistaken. The appellants raised the nonjudicial act theory in a Motion for Reconsideration of the Order Dismissing Judge Hosemann in Light of New Authorities. The district court denied this motion on June 3, 1981, and the appellants noted an appeal of this denial.

In *Stump v. Sparkman,* the Supreme Court discussed with approval the Fifth Circuit standard for what constitutes a judicial act for purposes of judcial immunity. 98 S.Ct. at 1107, *citing McAlester v. Brown,* 469 F.2d 1280, 1282 (1972). The Court stated that:

> . . . the factors determining whether an act by a judge is a "judcial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.

—*Id.*

The appellants rely on *Rankin v. Howard,* 633 F.2d 844 (9th Cir.1980), *cert. denied* 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981), where that court concluded that a judge's private, prior agreement to decide in favor of one party is not a judicial act. *Id.* at 847. Applying the *Stump* definition of "judicial act," the *Rankin* court reasoned:

> Although a party conniving with a judge to predetermine the outcome of a judicial proceeding may deal with him in his "judicial capacity," the other party's expectation, *i.e.*, judicial impartiality, is actively frustrated by the scheme. In any event, the agreement is not "a function normally performed by a judge." It is the antithesis of the "principled and fearless decision-making" that judicial immunity exists to protect. *See Pierson v. Ray,* 386 U.S. 547, 554, 87 S.Ct. 1213, 1217, 18 L.Ed.2d 288 (1967); *Gregory v. Thompson,* 500 F.2d [59] at 63 [9th Cir. 1974].

Id.

While it could be urged that the *Rankin* reasoning is persuasive, it appears that this circuit has, at least in dicta, rejected *Rankin's* conclusion concerning the non-judicial character of prior agreements. In *Harper v. Merckle*, 638 F.2d 848 (5th Cir. Unit B), *cert. denied* 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981), this court stated, "we note that even a judge who is approached as a judge by a party for the purpose of conspiring to violate § 1983 is properly immune from a damage suit." *Id.* at 856 n. 9. The *Harper* court relied on *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), where the Supreme Court stated in reference to the dismissal of a judge alleged to have conspired with private parties: "The courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on the immunity grounds." *Id.* at 186. Subsequently, the Eleventh Circuit, in dismissing a claim against a court clerk on the grounds of judicial immunity, held that immunity would be assured despite the appellants' assertion that the court clerk and another defendant conspired with one another or reached an understanding about the judicial act to be performed. *Scott v. Dixon*, 720 F.2d 1542, 1546-47 (11th Cir.1983). Although we think the *Rankin* opinion is well reasoned on this point, we follow *Scott*, and hold that even advance agreements between a judge and other parties as to the outcome of a judicial proceeding do not pierce a judge's immunity from suits for damages.

2. Absence of Jurisdiction

The appellants also argue that Judge Hosemann is not immune from liability because he acted in the absence of either subject matter or personal jurisdiction.

a. Subject matter jurisdiction

It is clear that a judge who acts in the absence of subject matter jurisdicition may be held liable for his judicial acts. *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978): *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872). The rationale for this limitation on judicial immunity is set out in *Bradley v. Fisher* and reiterated in *Stump v. Sparkman*: "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known, no excuse is permissible." *Stump*, 98 S.Ct. at 1104 n. 6, *quoting Bradley*, 13 Wall. at 351, 20 L.Ed. 646. *Stump* also points out that subject matter jurisdiction must be broadly construed where the issue is a judge's immunity, and notes a distinction between lack of jurisdiction and excess of jurisdiction. 98 S.Ct. at 1105. Illustrative of a clear lack of subject matter jurisdiction would be a situation where a probate judge, with jurisdiction only over wills and estates, would try a criminal case. The probate judge would not be immune from suit. On the other hand, if a judge of a criminal court convicted a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.* at n. 7, *citing Bradley*, 13 Wall. at 352, 20 L.Ed. 646.

In the instant case, the appellants' argument regarding lack of subject matter jurisdiction is that because Aaron could not qualify as a "dependent" under Florida law, *see* note 1 *supra*, and accompanying text, Judge Hosemann was without jurisdiction over the case. This argument must fail. Section 39.02 of the 1977 Florida Statutes states that, "The circuit court shall have exclusive original

jurisdiction of proceedings in which a child is alleged to be dependent or delinquent. . . ." There is no question that Judge Hosemann was a circuit court judge, and that the petition presented to Judge Hosemann on November 22, 1977 alleged that Aaron was a "dependent" child. Accordingly, Judge Hosemann had subject matter jurisdiction of the case. Whether or not Judge Hosemann erred in his determination that Aaron was a "dependent" child is irrelevant to the issue of whether Judge Hosemann had subject matter jurisdiction to make such a determination. *See Stump v. Sparkman,* 435 U.S. 349, 98 S. Ct. 1099, 1106, 55 L. Ed.2d 331 (1978); *Scott v. Hayes,* 719 F.2d 1562, 1566-67 (11th Cir. 1983).

b. Personal jurisdiction

Although we conclude that Judge Hosemann had subject matter jurisdiction to enter the order complained of, the appellants also contend that Judge Hosemann did not have personal juridiction to enter the order, and that such lack of personal jurisdiction abrogated his judicial immunity.

This is a question of first impression in the Eleventh Circuit.[9] Only the Ninth Circuit has thoroughly addressed this issue. *Rankin v. Howard,* 633 F.2d 844 (9th Cir.1980),

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9. The Supreme Court in *Stump v. Sparkman* acknowledged that Judge Stump may have committed "grave procedural errors" when he ordered a 15-year-old "somewhat retarded" girl sterilized on the petition of her mother but without notice to or appointment of an attorney *ad litem* for the girl. 98 S.Ct. at 1106. However, as the *Rankin* court noted, the Supreme Court did not explicitly consider whether Judge Stump acted in the clear absence of personal jurisdiction or whether such action would be protected by judicial immunity. 633 F.2d at 848.

cert. denied, 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981). *But cf. Green v. Maraio,* 722 F.2d 1013 (2d Cir. 1983); *Martin v. Aubuchon,* 623 F.2d 1282 (8th Cir.1980).

In *Rankin,* the parents of a member of the Unification Church instituted guardianship proceedings in a Kansas probate court as part of a "deprogramming" plan. The judge granted the guardianship petition in an *ex parte* hearing without notice to the son, even though the son was then a resident of Missouri, a fact allegedly known by the judge. Subsequently, the son was lured away from his Missouri home and taken to Arizona for nine days of "deprogramming." He escaped and sued his parents, the deprogrammers, the lawyer involved, and the Kansas judge in a § 1983 action.

In regard to whether absence of personal jurisdiction would abrogate judicial immunity, the *Rankin* court reasoned:

> When the Supreme Court first formulated the "clear absence" standard, . . . it stated that the principle of immunity applied when there was "jurisdiction of both subject and person." *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 352 (1872), 20 L.Ed. 646.
>
> An absence of personal jurisdiction may be said to destroy "all jurisdiction" because the requirements of subject matter and personal jurisdiction are conjunctional. Both must be met before a court has authority to adjudicate the rights of parties to a dispute.
>
> If a court lacks jurisdiction over a party, then it lacks "all jurisdiction" to adjudicate that party's rights, whether or not the subject matter is properly before it. *See, e.g., Kulko v. Superior Court,* 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978) ("[i]t has long been the rule that a valid judgment imposing a

> personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant") (citations omitted) . . . Because the limits of personal jurisdiction constrain judicial authority, acts taken in the absence of personal jurisdiction do not fall within the scope of legitimate decisionmaking that judicial immunity is designed to protect. *See Gregory v. Thompson*, 500 F.2d at 63. We conclude that a judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity.

Id. at 848-849 (footnotes omitted).

We agree with the *Rankin* court's analysis. We point out in addition, that the rationale for the limitation on judicial immunity when subject matter jurisdiction is lacking applies with equal force when personal jurisdiction is lacking. In *Bradley v. Fisher*, the court stated that where there is no jurisdiction over the subject matter, any authority exercised is a usurped authority. 13 Wall. at 351, 20 L.Ed. 646. Although the modern conception of personal jurisdiction generally refers to due process, *see, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the foundation of personal jurisdiction has always been a court's power to act. *McDonald v. McBee*, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608 (1917); *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). When a court acts without personal jurisdiction, its authority is as much a usurped authority as when the court acts without subject matter jurisdiction.

We also agree with the *Rankin* court that immunity for judicial acts in the clear absence of jurisdiction is lost only if the judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law ex-

pressly depriving him of jurisdiction. *See* 633 F.2d at 849. Issues of jurisdiction are often complex, and judges should be free to decide them without concern that their errors may subject them to liability.

In the instant case, the federal district court judge assumed that a court which had subject matter jurisdiction did not act in the clear absence of jurisdiction. The court refused to reconsider its ruling when the appellants introduced *Rankin* as new authority. Because the issues of whether Judge Hosemann knew he lacked personal jurisdiction or acted in the face of clearly valid statutes or case law expressly depriving him of jurisdiction are matters for initial determination in the district court, we reverse the order dismissing the claim against Judge Hosemann and remand to the district court for further proceedings not inconsistent with this opinion.[10]

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10. Judge Hosemann argued in his brief that Florida statutes required only personal jurisdiction over the child Aaron in dependency cases. He based this argument on § 39.06(7), which provided:

> (7) The jurisdiction of the court shall attach to the child and the case when the summons is served upon the child, a parent or legal or actual custodian of the child . . .

Although no summons was served on anyone in the case, Hosemann pointed to § 39.06(1), which stated:

> (1) Personal appearance of any person in a hearing before the court shall obviate the necessity of serving process on that person.

According to Hosemann, the fact that Buzzy's name was on the petition and Buzzy's presence outside the judge's chambers constituted constructive appearance, obviating the need for service on Buzzy, and attaching the jurisdiction of the court to the case.

When questioned at oral argument, Hosemann's attorney seemed to concede that personal jurisdiction over Diana was necessary for the entry of the custody order, and that it did not exist.

B. Thomas Weinberg

The district court granted summary judgment to Florida Health and Rehabilitative Services official Thomas Weinberg because it found that as a state executive official he was entitled to qualified immunity.

The standard for such qualified immunity is set out in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.E.2d 396 (1982):

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 2738. *See also Zeigler v. Jackson,* 716 F.2d 847, 849 (11th Cir.1983). Where an individual official would be expected to know that certain conduct would violate statutory or constitutional rights he should be made to hesitate. *Harlow v. Fitzgerald,* 102 S.Ct. at 2739; *Scott v. Dixon,* 720 F.2d 1542, 1548 (11th Cir.1983).

Weinberg does not argue that he should not be expected to know that adjudicating Diana's right to custody without notice to her would violate her constitutional rights. Instead, he asserts that he just did his job and that at any rate it was not his duty to notify Diana of the dependence proceeding. His position is that *he* did not deprive the appellants of any constitutional rights.

However, Weinberg does not adequately address the appellants' contention that Weinberg acted as part of a conspiracy to deprive the appellants of their constitutional rights. To show a conspiracy to violate § 1983, the appel-

lants must show that the appellees "reached an understanding" to violate their rights. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir.1979). *See also Cole v. Gray*, 638 F.2d 804 (5th Cir.), *cert. denied*, 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981). Even if it was not Weinberg's personal statutory duty to notify Diana, he could be held liable on a conspiracy theory if he reached an understanding with the other appellees to violate Diana's constitutional rights.

Summary judgment is inappropriate where the record, examined in the light most favorable to the party opposing the motion shows any material facts in dispute. *Adickes v. S.H. Kress & Co.*, 90 S.Ct. at 1609. Weinberg's participation in the petition process on his day off, the testimony of HRS official Kenneth Lofback concerning the propriety of a dependency proceeding under the circumstances of the case, the meeting between Weinberg, Judge Dykes, Buzzy and Judge Hosemann in Judge Hosemann's chambers to formulate a plan to regain physical custody of Aaron and other evidence in the record at least indicates that fact issues exist as to whether Weinberg took part in a conspiracy to violate the appellants' constitutional rights. Accordingly, summary judgment for Weinberg is reversed.

C. Judge Dykes and Buzzy Dykes

The district court granted summary judgment in favor of Judge Dykes because his actions constituted normal grandfatherly concern rather than action under color of state law. However, as previously discussed (*see* section

IIA *supra*), the requisite element of action under color of state law for § 1983 purposes is provided by Judge Hosemann's alleged participation in the alleged conspiracy, whether or not Hosemann is held to be immune from suit. *Dennis v. Sparks*, 101 S.Ct. at 186.

The appellants have presented documentary evidence in the form of Judge Dykes' notes both before and after the custody order, from which inferences can be drawn that Judge Dykes was the instigator of the dependency petition and the plan to regain physical custody of Aaron by means of the original order. These notes, in addition to other testimonial and circumstantial evidence in the record convince us that triable fact issues exist as to Judge Dykes' participation in a conspiracy to deprive the appellants of their constitutional rights.

As to Buzzy Dykes, the district court concluded that the undisputed facts failed to show that Buzzy was a willful participant in joint action with the other defendants.[11]

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11. The district court also held as a matter of law that Diana's constitutional rights had not been violated since Buzzy told her that he had a court order preventing Aaron's removal from Florida. In light of the lack of formal notice to Diana *before* entry of the order, and Diana's testimony that she did not believe Buzzy, we cannot hold such "notice" constitutionally adequate as a matter of law. (See section II *supra*.)

The Dykes cite *Thompson v. Bass*, 616 F.2d 1259 (5th Cir., *cert. denied*, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980)), for the proposition that failure to give proper notice can be cured by subsequent proceedings in which adequate notice and hearings are provided. We note first of all that this circuit has not applied the *Thompson* case to situations other than employee terminations. Furthermore, in this § 1983 ac-

(Continued on following page)

To the contrary, we find sufficient evidence that Buzzy participated in joint action with the other appellants. He gave Weinberg the information for the dependency petition, he met with several of the appellants in Judge Hosemann's chambers to plan how to regain custody of Aaron, and he flew to Maryland with all the court orders and picked up Aaron. The real question is whether there was a conspiracy to violate the appellants' constitutional rights. Because a jury could draw inferences of a conspiracy from the evidence presented, we hold that the summary judgment in favor of Buzzy was unwarranted.

D. Attorney McIntosh

The district court dismissed attorney Kenneth McIntosh as a party defendant on the basis that, Judge Hosemann already having been immunized, McIntosh did not act under color of state law. As previously discussed (*see* section IIA *supra*), private parties who conspire with an immune judge in connection with the judge's official acts are acting under color of state law and may be held liable under § 1983. *Dennis v. Sparks*, 102 S.Ct. at 186. Accordingly, the ground upon which the district court rested its dismissal of McIntosh is erroneous.

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tion, the question of whether Diana was injured as a result of the November 1977 custody order, or whether the subsequent custody proceedings did cure the original lack of notice, is one for the jury. In this context, we point out that all court orders in the state custody proceedings were based on and referred to the original November 1977 order, and that the final custody order was based largely on the fact that because of the original order Buzzy had already had custody of Aaron for a year.

However, the district court also mentioned in passing on attorney McIntosh's motion to dismiss that he did not think that there were sufficient allegations against McIntosh. On appeal, McIntosh argues that we should affirm the district court on this basis.

With regard to a motion to dismiss for failure to state a claim, a § 1983 complaint should not be dismissed unless it appears that the plaintiff can prove no set of facts which would entitle him to relief. *Doe v. Public Health Trust of Dade County,* 696 F.2d 901, 907 (11th Cir.1983) (Hatchett, J., specially concurring); *Richardson v. Fleming,* 651 F.2d 366, 368 (5th Cir.1981). For purposes of testing sufficiency of the complaint, the allegations of the complaint must be taken as true. *Richardson,* 651 F.2d at 368. Furthermore, private attorneys alleged to have conspired with immune state officials may be held liable under § 1983. *Id.* at 371. Here, the appellants allege that the appellees, including McIntosh, conspired to utilize the allegedly illegal November 22, 1977 custody order to obtain permanent custody of Aaron, and that McIntosh knew or should have known that that order was improper and illegal. Taking these allegations as true, we hold that if proven, they could entitle the appellants to § 1983 relief against McIntosh. Accordingly, dismissal of the appellants' complaint against McIntosh is reversed.

IV. Other Issues

A. Dismissal of Aaron as a plaintiff

The district court dismissed Aaron as a plaintiff *sua sponte* because of the court's conclusion that Aaron had suffered no damages. This ruling was made from the

bench without motion, briefing or argument, in response to a different motion to dismiss Aaron as a plaintiff on the grounds that Diana was not a proper person to sue as Aaron's next friend while Buzzy was his legal guardian. Diana and Aaron appeal this dismissal.

Damages for mental and emotional stress caused by the denial of procedural due process may be awarded in a § 1983 action. *Carey v. Piphus*, 435 U.S. 247, 264, 98 S.Ct. 1042, 1052, 55 L.Ed.2d 252 (1978). Absent proof of actual injury, nominal damages may be awarded. *Id.* at 266-67, 98 S.Ct. at 1053-1054. Punitive damages may be awarded in a § 1983 action even without a showing of actual loss by the plaintiff if the plaintiff's constitutional rights have been violated. *McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir.1980).

In the instant case, Diana testified in her deposition that Aaron suffered emotional distress as a result of being deprived of his mother's care and companionship. If Aaron's constitutional rights were violated, he might have been entitled to nominal damages even without proof of actual injury. Because an issue of material fact remained as to whether Aaron suffered damages, his dismissal as a plaintiff on this ground was error.[12]

B. Res Judicata

The appellees argue that the appellants have litigated or have had the opportunity to litigate their due process

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12. We express no opinion as to the appellees' argument on representative capacity, which we leave for initial determination by the district court.

claims in state court and that therefore they should be precluded from reasserting them in federal court.[13] The district court agreed with the appellees.

A recent Supreme Court case holds that a state court judgment has the same claim preclusive effect in a § 1983 suit in federal court as that judgment would have in courts of the state from which it was issued. *Migra v. Warren City School District Board of Education*, — U.S. — , —, 104 S.Ct. 892, 898, 79 L.Ed.2d 56 (1984). Furthermore, both sides agree that a recent Florida case clearly sets forth Florida law on claim preclusion. *Albrecht v. State*, 444 So.2d 8 (Fla.1984). There the Florida Supreme Court stated:

> [W]hen the second suit is between the same parties, but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it. . . . Therefore, if the cause of action is not the same there will be no estoppel as to those issues which *could* have been litigated in the previous action. The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.

Id. at 12 (citations omitted).

As in *Migra*, it is not apparent whether the district court in the instant case applied state or federal law in

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13. Appellees Weinberg and Hosemann also argue that because federal courts do not have jurisdiction to review, modify, or nullify an order of a state court, the federal district court was without jurisdiction in the instant case. This argument is without merit. The appellants did not seek to have the federal district court review a state order; they sought damages for violation of constitutional rights.

concluding that "the state decisions would seem to put this matter to rest . . . ." Therefore, like the *Migra* court, we remand to the district court for initial interpretation and application of Florida law on this point. *See Migra*, — U.S. at — , 104 S.Ct. at 899.

V. Conclusion

We reverse the district court's judgments as to each of the appellees and remand for further proceedings not inconsistent with this opinion. The appellees' requests for attorney fees are accordingly DENIED.

REVERSED and REMANDED.

JAMES C. HILL, Circuit Judge, dissenting.

This section 1983 action arises as the result of a very unfortunate dispute between an estranged husband and wife over the custody of their child. If there are any cases where conclusory allegations of conspiracy and wrongdoing are likely to be made against a judge and other persons involved in the dispute, they are cases such as this, where the strongest emotions of both parties are unleashed. A court must strictly scrutinize conclusory allegations in a case like this, given the ease with which they can be made by a disappointed party.

It is easy to sympathize with appellant Diana Dykes' plight under the unusual facts of this case. There is little doubt that Buzzy Dykes occupied a favorable position in litigating against Diana in the Florida courts, due to Buzzy's father's position as a Florida circuit court judge. However, I do not know how the law can remedy this situation, short of holding that a judge or his family may not litigate contested issues in court without being sub-

ject, along with the judge that hears the issues, to a charge of conspiracy. Thus, although I assume that appellant's allegations of conspiracy are sufficient to state a claim under section 1983, I dissent from the majority because it is clear to me that these allegations are unfounded and without support on the record of this case; and therefore that the dismissal of all defendants by the district judge was proper.

I. JUDGE HOSEMANN

In considering judicial immunity, two things must be kept in mind. First, immunity is designed to prevent a disgruntled litigant from hauling a judge into court and requiring him to justify and defend his decision. *See Beard v. Udall,* 648 F.2d 1264, 1269 (9th Cir.1981). In this respect, a policy determination has been made that the public interest in ensuring the independence of the judiciary outweighs the likelihood that a certain number of bad acts by specific judges will go unpunished. Second, immunity is meaningless if it is granted only to those who do nothing wrong. Judicial immunity is intended not to protect wrongdoers, but to protect all judges who undertake to resolve issues thrust upon them that they are in no position to decline. However, if immunity is to amount to anything, there will be immunity for very bad conduct. A judge may rule incorrectly, or even in bad faith, in which case there may be a temptation to express strong disapproval of his actions by finding that he has made himself liable for damages. This temptation must be resisted.

It is undisputed that Judge Hosemann erred in granting the November 22, 1977, temporary custody order based

on the dependency petition presented to him. However, this error should not deprive him of judicial immunity under the facts of this case.

A. *Nonjudicial Acts.*

The majority follows *Scott v. Dixon,* 720 F.2d 1542 (11th Cir.1983), and *Harper v. Merckle,* 638 F.2d 848, 856 n. 9 (5th Cir. Unit B), *cert. denied,* 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981) in holding that "even advance agreements between a judge and other parties as to the outcome of a judicial proceeding do not pierce a judge's immunity from" damage suits. I completely agree, and write here merely to express displeasure over the majority's approval of the reasoning of *Rankin v. Howard,* 633 F.2d 844 (9th Cir.1980), *cert. denied,* 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981), which held the opposite.

When a judge is approached by a litigant and presented with a petition, it is his duty to rule on the petition. In doing so, he is performing a normal judicial function and is immune from suit, regardless of the fact that he may have earlier agreed to decide in favor of one party.[1] *Harper v. Merckle,* 638 F.2d at 856 n. 9 859; *see*

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1. Judge Hosemann's ruling on the dependency petition satisfies this circuit's four factor test for a judicial act, in that: (1) the events involved occurred in Judge Hosemann's chambers; (2) the controversy centered around the dependency case pending before the Judge; (3) the confrontation arose directly out of a visit to Judge Hosemann in his official capacity; and (4) the precise act complained of, Judge Hosemann's ruling on the petition, is a normal judicial function. *See Harper v. Merckle,* 638 F.2d at 858.

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Dennis v. Sparks, 449 U.S. 24, 26-27, 101 S.Ct. 183, 185-186, 66 L.Ed.2d 185 (1980). The *Harper* case emphasized the narrow factual circumstances under which a judge's acts will be found non-judicial and thus subject him to liability.[2] These circumstances are not present in Judge Hosemann's situation, even if we were to assume that he reached a prior agreement to rule in favor of Buzzy Dykes.[3]

The grave implication of the *Rankin* decision is that, based on conclusory allegations of conspiracy and prior agreements, judges will often be called into court and examined and cross-examined about their judicial decisions merely because they were called upon as judges to deal with unpleasant cases.

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It is improper and overly formalistic to separate a judge's prior agreement to decide in favor of one party from the specific act of ruling on the case itself, as the *Rankin* court did, 633 F.2d at 847, because that separates the rationale behind the decision from the decision itself. As mentioned earlier, judicial immunity is intended to protect a judge from being brought into court and forced to justify each decision that he makes.

2. The "exceedingly narrow" holding in *Harper* was that a judge's actions are not "judicial acts" only when "it is beyond reasonable doubt that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears that no party has invoked the judicial machinery for any purpose at all." 638 F.2d at 859.

3. A judge who conspires to rule in favor of a party in a pending case is a bad judge who is performing improper and unethical acts; but this should be remedied by impeachment, or at the following judicial elections, and not by a section 1983 action.

B. *Personal Jurisdiction.*

The majority opinion relies on *Rankin v. Howard,* 633 F.2d 844 (9th Cir.1980), *cert. denied,* 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981) in remanding to the district court to determine whether Judge Hosemann knew that he lacked personal jurisdiction or acted in the face of clearly valid law expressly depriving him of personal jurisdiction. I strongly dissent from this portion of the opinion, which represents an alarming break with what has generally been considered necessary to pierce judicial immunity.

In *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978), the Supreme Court stated that

> the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

Id. at 356-57, 98 S.Ct. at 1105 (*citing Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1872)). The court further explained that "[a] judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by grave procedural errors," such as the "failure to comply with elementary principles of procedural due process." *Id.* at 359, 98 S.Ct. at 1106.

The majority opinion in this case goes much farther towards abrogating judicial immunity than *Stump* indicates is appropriate. Indeed, the *Rankin* holding on personal jurisdiction has been severly limited by subsequent

Ninth Circuit cases, indicating an almost immediate realization by that circuit that it had gone too far in *Rankin*.

In *O'Neil v. City of Lake Oswego*, 642 F.2d 367 (9th Cir.1981), the Ninth Circuit determined that a pro tem municipal judge's action in convicting a defendant of contempt (an offense generally within his court's jurisdiction) without requisite papers to confer jurisdiction over the particular alleged commission of the offense, constituted merely an act in excess of jurisdiction, and not an act in the clear absence of jurisdiction; thus the judge was held immune from liability. The court distinguished the situation in which a judge violates a rule of law *expressly* depriving it of jurisdiction (no immunity), from the case where a court merely fails to "comply with all the [procedural] requirements of a statute conferring jurisdiction," in which case the judge is still immune. *Id.* at 369-70. In explanation, the court stated that "fearless decision-making is fostered by granting judges immunity . . . even when they fail to comport with procedural niceties necessary to give the court power over the particular matter." *Id.*

Beard v. Udall, 648 F.2d 1264 (9th Cir.1981), involved facts surprisingly similar to our present case. Following a divorce decree under which the father was awarded custody of the children, the mother moved to another county and began working for a lawyer. While the children were visiting the mother, the lawyer petitioned a judge to modify the original divorce decree and to award custody of the children to the mother. The judge set a hearing on an order to show cause and entered a temporary restraining order preventing the father from remov-

ing the children from the county. Before the judge could rule on the petition for modification, the father "kidnapped" the children and took them back to his home. The father was then arrested for kidnapping and other felonies, though never prosecuted. He brought a § 1983 action alleging that the judge, the mother's lawyer and the sheriff acted to deprive him of his civil rights. In particular, he alleged that the judge had acted in the clear absence of jurisdiction by failing to follow certain applicable statutory procedural requirements, related to notice and hearing,[4] before issuing the order to show cause and the TRO. *Id.* at 1268. The Ninth Circuit held that:

> The fact that a judge commits "grave procedural errors" is not sufficient to deprive a judge of absolute immunity. *Stump,* 435 U.S. at 359, 98 S.Ct. at 1106. Thus, even if Beard's allegations that Judge Greer failed to adhere to the procedural rules established by the Arizona statutes are true, judicial immunity precludes Beard from recovering for this alleged wrongful act.

Id. at 1269.

In our present case, it is undisputed that appellant Diana Dykes did not receive notice or a hearing prior to the entry of the November 22, 1977, temporary custody

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4. It was alleged in *Beard* that the judge violated one Arizona statute requiring a notice and hearing before an order to show cause on a petition for modification could be issued, and another statute requiring that a TRO issued without notice "define the injury and state why it is irreparable and why the order was issued without notice." *Beard,* 648 F.2d at 1268 n. 4.

order. I assume, although it is certainly not clear,[5] that notice to the mother was required in order to obtain personal jurisdiction over the child and the case. Even so, this is squarely the situation faced in the *Beard* case, and analogous to the situation in *O'Neil*. Although Judge Hosemann may have proceeded erroneously, the most that can be said is that he committted a "grave procedural error" by failing to comply with all of the "procedural niceties" necessary to confer jurisdiction. In no respect did he act in such a "clear absence" of jurisdiction as to deprive him of his judicial immunity. The absence of notice and hearing is a flaw in the order itself, to be corrected on appeal or collateral attack, not by a section 1983 damages action brought against the judge.[6]

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5. Footnote 10 of the majority opinion clearly illustrates that there is a good deal of uncertainty as to the Florida statutory requirements for personal jurisdiction in a dependency case. Florida Statutes § 39.06(7) states that jurisdiction attaches to the child and the case when a summons is served upon the child or "a parent," and § 39.06(1) provides that personal appearance of any person at a hearing obviates the necessity of serving a summons. This is a notice requirement, and there is no doubt that Buzzy, who is "a parent," had actual notice of the dependency proceedings, whether or not he "constructively" appeared before Judge Hosemann.

6. It is interesting to note that Diana never attempted to appeal the November 22nd order. Moreover, that order merely provided for temporary custody, with a full hearing on custody to be held later. Diana appeared at a Florida custody hearing before Judge Muldrew in February, 1978, at which it was determined that Buzzy would retain temporary custody pending an HRS report on the parents' suitability as permanent custodians.

II. THOMAS WEINBERG

The majority states the correct standard for granting qualified immunity to a state executive official, but then fails to consider the facts of this case in reversing summary judgment, which was granted on the basis of that immunity.

The district court opinion granting summary judgment in this case sets out Weinberg's statutory duties in the processing of a dependency petition. *Dykes v. Weinberg,* 564 F.Supp. 536, 541-42 (M.D.Fla.1983). The facts show that Weinberg properly concluded that the HRS would not initiate a dependency proceeding on behalf of Buzzy Dykes, and then, as required by the Florida statute, he advised Buzzy and Judge Dykes that they had a right to file their own petition. Weinberg and Kenneth Lofback also assisted the Dykes in the preparation of the petition and its presentment to Judge Hosemann; but affidavits from Weinberg and three other HRS employees state that this was a customary HRS practice, and the appellant has presented no evidence to the contrary. Weinberg did meet with Hosemann and the Dykes to discuss the possibilities for regaining custody of the child after Diana took the child back to Maryland with her, but again, the HRS affidavits indicate that the HRS is an arm of the court in juvenile matters, with a duty to advise the judge when he asks for assistance in a juvenile case.

In short, appellant's bald assertions that Weinberg was participating in a conspiracy are met by undisputed facts which indicate that Weinberg was merely acting according to his statutory duty and customary HRS prac-

tice and procedure. If there is such a thing as qualified immunity for a state official, then nothing has been shown here to pierce it. Summary judgment was proper.

III. ATTORNEY MCINTOSH

Appellant's only allegations as to McIntosh's participation in the "conspiracy" is that he planned with Buzzy and Judge Dykes to use the "illegal and improper" November 22nd custody order, which he knew or should have known was illegal. Amended Complaint, ¶ 14. This is probably sufficient to satisfy the "under color of state law" requirement in section 1983, since this conspiracy allegedly involved two state agents, Judge Dykes and HRS official Weinberg. *See Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). However, the complaint sets forth absolutely no acts of conspiracy or active cooperation between McIntosh and the other defendants in this case, outside of actions within the normal attorney-client relationship.

McIntosh was retained by Buzzy and Judge Dykes around the end of January, 1978, about two months after the disputed November 22, 1977, order had been entered. This order was facially valid; it had never been appealed or held unlawful. McIntosh, representing Buzzy, filed a petition in the Florida courts for dissolution of marriage and custody of Aaron. It is undisputed that McIntosh never had any contact with Weinberg, and met Judge Hosemann only at a February show cause hearing in which he represented Buzzy. Appellant alleges no other conduct by McIntosh that would lend any support to her conspiracy claim. Her allegations indicate only that Mc-

Intosh was acting properly as an advocate, using each arsenal at his disposal.[7]

It is unclear whether the district judge dismissed McIntosh for failure to show state action, or for failure to state a claim. But it is clear that McIntosh can properly be dismissed for failure to state a claim, since the complaint is totally devoid of any allegation setting out an act of conspiracy between McIntosh and the other defendants, outside of the normal attorney-client relationship.

IV. JUDGE AND BUZZY DYKES

As was the situation with McIntosh, there are sufficient allegations of cooperation between the Dykes' and the two state agents in this case to satisfy the "under color of state law" requirement pursuant to *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185. However, a careful review of the record indicates that both Judge and Buzzy Dykes are properly entitled to summary judgment in this case. Viewing the evidence in the light most favorable to appellant, there is no genuine issue as to the existence of a conspiracy. Appellant's allegations in this case stem merely from the fact that the child's grand-

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7. Most lawyers "conspire" with their clients, in the sense of discussing and planning the strategy of a case. There is nothing alleged here other than this normal planning between an attorney and his client.

A lawyer is not required to inquire into the circumstances under which each facially valid order that he comes into contact with was issued. If a lawyer did find out that a previous order favoring his client was improperly entered he might be justified in refusing to use the order and recusing from the case. But if he merely takes an order sufficient on its face and uses it in advocating his client's rights, there can be no liability.

father happened to be a judge.[8] Murky allegations of a conspiracy, combined with proof of mere contact between the defendants and the fact of a favorable ruling on the petition at issue, are insufficient to raise a fact issue for trial on a conspiracy complaint under § 1983. *See Cole v. Gray,* 638 F.2d 804, 811 (5th Cir.), *cert. denied,* 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981). Thus, summary judgment was properly granted to both Judge and Buzzy Dykes.

IV. CONCLUSION

In sum, the possibility that Buzzy Dykes may have occupied a favorable litigating position by virtue of his father's position as a state court judge is insufficient to sustain a § 1983 conspiracy claim against all parties involved in the original lawsuit, where certain of the defendants were immune to suit, and the underlying actions of the other defendants do not substantiate the conspiracy allegations.

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8. If a prominent doctor, clergyman or industrialist in Brevard County had telephoned Judge Hosemann in the same situation, and an identical set of events had unfolded, it is doubtful that appellant would have gone very far with her conspiracy claim. The law should be no different when a judge's or a lawyer's family is involved in litigation. Otherwise, we are effectively holding that a judge or his family may not litigate contested issues in court without being subject to a conspiracy charge.

APPENDIX B

DYKES v. HOSEMANN

Diana Christine DYKES, et al.,

Plaintiffs-Appellants,

v.

A. J. HOSEMANN, Jr., etc., et al.,

Defendants-Appellees.

No. 83-3347.

United States Court of Appeals,
Eleventh Circuit.

Dec. 18, 1984.

Appeal from the United States District Court for the Middle District of Florida; George C. Young, Judge.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion October 11, 1984. 11th Cir., 1984, 743 F.2d 1488)

Before GODBOLD, Chief Judge, RONEY TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX C

Diana Christine DYKES, et al.,

Plaintiffs-Appellants,

v.

A.J. HOSEMANN, Jr., etc., Thomas A. Weinberg, etc., Roger Francis Dykes, Sr., etc., Roger Francis Dykes, Jr., etc., and Kenneth W. McIntosh, etc.,

Defendants-Appellees.

No. 83-3347.

United States Court of Appeals,
Eleventh Circuit.

Nov. 18, 1985.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON, and CLARK, Circuit Judges.

PER CURIAM:

We have taken this case en banc to examine the scope of judicial immunity in a suit for damages under 42 U.S.C. § 1983 (1982).[1] A panel of this court in *Dykes v. Hose-*

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1. 42 U.S.C. § 1983 (1983) provides:

§ 1983. Civil Action for deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

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mann, 743 F.2d 1488 (11th Cir.1984), held that, where a judge performs a judicial act affecting the rights of a party over whom he knows the court has no personal jurisdiction, the judge may be liable to such party for money damages. We find this result both contrary to precedent and policy and reassert the common law doctrine that a judge enjoys absolute immunity where he or she had subject matter jurisdiction over the matter forming the basis for such liability.

I.

This case grew out of a domestic dispute. The judicial act in question is a juvenile court order declaring a child dependent and temporarily awarding custody of the child to the father.

Diana Dykes and Roger Francis "Buzzy" Dykes, Jr. began experiencing marital difficulties in 1977. In November of that year, Buzzy took their only child, Aaron, from their home in Pennsylvania to his parents' house in Florida. It is alleged that Buzzy and his father, Roger F. Dykes, a Brevard County, Florida Circuit Court judge, formulated a plan to obtain a colorable court order awarding custody of Aaron to Buzzy. Judge Dykes telephoned Judge Anthony Hosemann, Jr., a member of his court then

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rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

assigned to the court's juvenile division[2] for advice. Judge Hosemann counseled that Buzzy come before him with a "dependency" petition and referred Judge Dykes to the Florida Department of Health and Rehabilitative Services (HRS).

Buzzy and Judge Dykes went to an HRS office and requested assistance in filing a dependency petition but were informed by an agency official that Aaron did not qualify as a dependent child.[3] After persistent requests, the official called his supervisor who agreed to assist in the preparation of the petition as long as it was not offi-

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2. The Brevard Circuit Court is a multi-judge court of general jurisdiction. For administrative purposes, the court is divided into civil, criminal, and juvenile divisions.

3. Under Florida law then in effect, a "dependent child" was a defined term:

(8) "Dependent child" means a child who:

(a) Has been abandoned by his parents or other custodians.

(b) For any reason, is destitute or homeless.

(c) Has not proper parental support, maintenance, care, or guardianship.

(d) Because of the neglect of his parents or other custodians, is deprived of education as required by law, or of medical, psychiatric, psychological, or other care necessary for his well-being.

(e) Is living in a condition or environment such as to injure him or endanger his welfare.

(f) Is living in a home which, by reason of the neglect, cruelty, depravity, or other adverse condition of a parent or other person in whose care the child may be, is an unfit place for him.

(g) Is surrendered to the Department of Health and Rehabilitative Services or a licensed child-placing agency for purposes of adoption.

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cially sponsored by HRS.[4] The following day the petition was presented to Judge Hosemann, and he signed an order declaring Aaron to be a "dependent child" and temporarily awarding custody to Buzzy.[5] Diana, the mother, was never served with a summons and a copy of the petition, as required by statute.[6]

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(h) Has persistently run away from his parents or legal guardian.

(i) Being subject to compulsory school attendance, is habitually truant from school.

Fla.Stat. § 39.01(8) (1977).

In 1978, the Florida State Legislature revised Chapter 39, and it became known as the Florida Juvenile Justice Act, with new sections effective October 1, 1978.

4. Under Florida law a dependency petition could be filed by the state attorney, an authorized agent of the division of youth services, or "any other person who has knowledge of the facts alleged or is informed of them and believes that they are true." Fla.Stat. § 39.05(2) (1977). In this case Buzzy filed the petition.

5. Implicit in the court's order was the notion that the court would revisit the question of who should have custody of Aaron if Diana or any other interested party demonstrated that a different custodial arrangement would be more appropriate.

6. The statute provided:

(2) Upon the filing of a petition containing allegations of facts which, if true, would constitute the child therein named a dependent child . . . , and upon the request of the petitioner, the clerk or deputy clerk shall issue a summons.

(3) The summons shall require the person on whom it is served to appear for a hearing at a time and place specified. The time shall not be less than 24 hours after service of the summons. If the child is not detained by an order

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Diana and her son[7] subsequently filed suit under 42 U.S.C. § 1983, 1985 (1982)[8] alleging that Buzzy, Buzzy's father, Judge Hosemann, and Thomas Weinberg, the HRS supervisor who assisted in the preparation of the dependency petition,[9] conspired to deprive them of their constitutional rights.[10] We today focus only on the plaintiffs' claims made against Judge Hosemann and determine whether under the facts of the case he is immune from suit.

II.

Since the sixteenth century, common law has immunized judges from suit for judicial acts within the jurisdic-

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> of the court, the summons shall require the custodian to produce the child at the said time and place. A copy of the petition shall be attached to the summons.
>
> (4) The summons shall be directed to, and shall be served upon, the following persons:
>
> . . . .
>
> (b) The parents; and
>
> (c) The legal custodians, actual custodians, and guardians ad litem [of the child], if there be any other than the parents.

Fla.Stat. § 39.06 (1977).

7. Diana sued in behalf of her son, a minor, in a representative capacity, as his "mother and next friend."

8. The district court dismissed the section 1985 claim for lack of an allegation of class-based animus. Appellants have not appealed this decision.

9. Also included as a defendant was Kenneth McIntosh, Buzzy's lawyer.

10. The complaint alleged that the defendants had denied the plaintiffs' procedural and substantive due process rights and

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tion of the court.[11] This doctrine of judicial immunity was embraced by the Supreme Court as early as 1872 when the Court noted that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him [should] be free to act upon his own convictions, without apprehension of personal consequence to himself." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646

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their right to equal protection of the law guaranteed them by the fourteenth amendment. On appeal, the plaintiffs abandoned their equal protection and substantive due process claims. *Dykes v. Hosemann*, 743 F.2d 1488, 1493 n. 6 (11th Cir. 1985). Consequently, the only constitutional claims before us concern the denial of procedural due process.

11. Lord Coke's opinion in *Floyd v. Barker*, 77 Eng.Rep. 1305 (Star Chamber 1607), ushered in the modern era of judicial immunity by establishing the immunity of judges of courts of record, thereby preserving the independence of those courts from review by the Star Chamber, which was under control of the king. In that case, Lord Coke enunciated for the first time what are now considered the modern public policy reasons for the doctrine: (1) the need for finality; (2) the need for maintaining public confidence in the system of justice; and (3) the need for maintaining the independence of the judicial system. Lord Coke refined the doctrine in *The Marshalsea*, 77 Eng.Rep. 1027 (Star Chamber 1612) (which held that actions taken by a court lacking subject matter jurisdiction were *coram non judice*—before a person who was not a judge—*see Bowser v. Collins*, Y.B. Mich. 22 Edw. 4, f. 30, pl. 11 (1483), and rendered a judge liable for the consequences of his judicial acts. Subsequent cases further refined the doctrine of judicial immunity. *See Peacock v. Bell*, 85 Eng.Rep. 84 (K.B.1667) (burden of pleading and proving lack of jurisdiction placed on plaintiff); *Hamond v. Howell*, 86 Eng.Rep. 1035, 1037 (C.P.1677) (refusing to apply the jurisdictional limit rule of *The Marshalsea* to a judge acting *"quatenus* a judge"); *Gwinne v. Poole*, 125 Eng.Rep. 858 (C.P.1692) (judge retains immunity unless he was aware of facts suggesting a lack of jurisdiction). *See generally* Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 Duk L.J. 879.

(1872).[12] More recently, the Court held that Congress, in enacting section 1983, did not intend to abolish the doctrine of judicial immunity in cases alleging state deprivation of federal constitutional rights. *Pierson v. Ray,* 386 U.S. 547, 554-55, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). In *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L. Ed.2d 331 (1978), the Court established a two-part test for determining whether a judge enjoys absolute immunity from money damages under section 1983. First, did the judge deal with the plaintiff in his judicial capacity? *Id.* at 362, 98 S.Ct. at 1107. If he did not, then judicial immunity does not lie. If he did act in such a capacity, then the focus is on whether the judge acted in the "clear absence of all jurisdiction.' "[13] *Id.* at 357, 98 S.Ct. 1105 (quoting *Bradley,* 80 U.S. (13 Wall.) at 351). In this case, then, we must determine whether Judge Hosemann acted in his judicial capacity in finding dependency and awarding temporary custody of Aaron to Buzzy and, if so, whether he acted in the absence of all jurisdiction.

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12. Even prior to *Bradley v. Fisher, the Court, in Randall v. Brigham,* 74 U.S. (7 Wall.) 523, 537, 19 L.Ed. 285 (1869), stated that judges are not liable "to private parties in civil actions for their judicial acts, however, injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." In *Bradley v. Fisher,* the Court reconsidered this statement and concluded that "the qualifying words used were not necessary to a correct statement of the law." 80 U.S. (13 Wall.) at 351.

13. Judicial immunity does not bar prospective injunctive relief against a judicial officer acting in his judicial capacity. *See Pulliam v. Allen,* 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). Such relief, however, was not sought in this case.

A.

In *Harper v. Merckle,* 638 F.2d 848 (5th Cir.), *cert. denied,* 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981),[14] the court focused on the following factors in determining that a judge's conduct constituted a judicial act:

> (1) the precise act complained of . . . is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

Id. at 858 (quoting *McAlester v. Brown,* 469 F.2d 1280, 1282 (5th Cir.1972)). Clearly, Judge Hosemann's signing of the order finding Aaron to be a dependent child and awarding temporary custody of the child to Buzzy satisfies the indicia of a judicial act. Appellants, however, argue that Judge Hosemann's alleged agreement prior to the dependency proceedings to grant Buzzy custody of Aaron was a nonjudicial act. They rely on *Rankin v. Howard,* 633 F.2d 844, 847 (9th Cir.1980), *cert. denied,* 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981), in which the Ninth Circuit held that a judge's private, prior agreement to decide an issue in favor of one party was not a judicial act for purposes of judicial immunity. This circuit, however, has declined to follow *Rankin.* In *Harper v. Merckle,* 638 F.2d at 856 n. 9, we stated that "even a judge who is approached as a judge by a party [and conspires with

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14. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

such party] to violate [another party's federal constitutional rights] is properly immune from a damage suit" brought under section 1983. We relied on *Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), where, in reference to the dismissal from a case of a judge alleged to have conspired with private parties, the Supreme Court noted that "[t]he courts below concluded that the judicial immunity doctrine required dismissal of the § 1983 action against the judge who issued the challenged injunction, and as the case comes to us, the judge has been properly dismissed from the suit on the immunity grounds." *Id.* at 27, 101 S.Ct. at 186. In addition, in *Scott v. Dixon,* 720 F.2d 1542, 1546-47 (11th Cir.1983), *cert. denied,* — U.S. —, 105 S.Ct. 122, 83 L.Ed.2d 64 (1984), affirming the dismissal of a claim against a court clerk, we held that judicial immunity would be assumed despite the appellants' assertion that the court clerk and another defendant conspired with one another or reached an understanding concerning a judicial act to be performed. It is therefore clear that this circuit has rejected the *Rankin* rationale and refuses to divest a judge of his absolute immunity from suit notwithstanding a prior agreement he may have made with a party to the controversy. Were we to follow *Rankin,* judges, on mere allegations of conspiracy or prior agreement, could be hauled into court and made to defend their judicial acts, the precise result judicial immunity was designed to avoid. We find this circuit's precedent, which avoids the possibility of such a result, to be a more accurate reflection of the scope and

rationale of the doctrine as it has been fashioned by the Supreme Court.[15]

B.

Appellants allege that Judge Hosemann acted in "the clear absence of all jurisdiction" because he lacked subject matter jurisdiction over the dependency proceeding and jurisdiction over their persons; therefore, he cannot claim immunity. Section 39.02(1) of the 1977 Florida Statutes provided that "[t]he circuit court shall have exclusive original jurisdiction of proceedings in which a child is alleged to be dependent." There is no question that Judge Hosemann was a circuit court judge and that the petition presented to him on November 22, 1977 alleged that Aaron was a "dependent" child. Thus it is clear that Judge Hosemann had subject matter jurisdiction over the case. That he may have incorrectly concluded that Aaron actually was dependent does not affect the fact that it was within his power to make that determination. *See Stump v. Sparkman,* 435 U.S. at 356-57, 98 S.Ct. at 1105.

Judge Hosemann, however, did lack personal jurisdiction over one of the parties to the dispute. He signed the order finding Aaron a dependent child and awarded custody to Buzzy even though no summons, accompanied by a copy of the petition, was ever directed to Diana as re-

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15. At least one other circuit has specifically rejected *Rankin. See Holloway v. Walker,* 765 F.2d 517, 522 (5th Cir.1985). The Ninth Circuit itself appears to have retreated from the holding of the case. *See infra* note 19.

quired by statute.[16] The issue we must resolve is whether a judge who acts within his or her subject matter jurisdiction before acquiring personal jurisdiction over a party to the suit can be made to answer in money damages.

In *Stump v. Sparkman,* the Supreme Court counseled that

> the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

435 U.S. at 356-57, 98 S.Ct. at 1105 (citing *Bradley v. Fisher,* 80 U.S. (13 Wall.) at 351). Although the Court referred to jurisdiction in general terms, the context of the statement indicates that the Court was referring to a complete absence of subject matter jurisdiction. The passage itself cited to a footnote in which the Court presented an example of a lack of subject matter jurisdiction.[17] More

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16. *See supra* note 6 and accompanying text. Although the appellants appear to have alleged that personal jurisdiction was lacking as to both Diana and Aaron, it is clear that Aaron was before the court. We draw this conclusion because Buzzy, who had custody of Aaron and filed the petition as as father and custodian of the child, was before the court. The formal "service" of a summons and petition on Buzzy would have been superfluous.

17. This footnote reads:

> In *Bradley,* the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction

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> over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, [80 U.S. (13 Wall.)], at 352.

Three possible meanings may be gleaned from the "clear absence of all jurisdiction" requirement; judicial immunity is lost if (1) both subject matter and personal jurisdiction are absent; (2) subject matter jurisdiction exists but personal jurisdiction is lacking; or (3) subject matter jurisdiction is lacking and personal jurisdiction exists. The first two possibilities seem foreclosed by the language in the footnote. In stating that, if subject matter jurisdiction exists, the judge is immune, the Court implies that the presence of personal jurisdiction is irrelevant in determining whether immunity exists. Therefore, the Court seems to adopt the third possibility and requires the absence of subject matter jurisdiction to defeat a claim of immunity.

The Court in *Stump* emphasizes this point in its observation that "[a] judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." 435 U.S. at 359, 98 S.Ct. at 1106. Appellants in this case alleged a lack of personal jurisdiction as a result of a procedural error, failure properly to summon a necessary party before the court. This claim is distinguishable from an allegation that the minimum contacts within the territorial jurisdiction of the court as required by *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), were absent. The error about which appellants complain is purely procedural; but even grave procedural errors will not operate to divest a judge of his immunity from suit. The Ninth Circuit, in a case involving a similar procedural error, refused to expose the judge to liability:

> [Judge] Martin's action in convicting O'Neil of contempt, an offense within his court's jurisdiction, although without the requisite papers to confer jurisdiction over this particular commission of the offense, is more analogous to a criminal court convicting for a nonexistent offense than to a probate court hearing a criminal case. It is the sort of

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importantly, the language in *Bradley* from which *Stump* quotes, more fully reads "clear absence of all jurisdiction *over the subject matter.*" *Bradley v. Fisher,* 80 U.S. (13 Wall.) at 351 (emphasis added).

Courts applying *Stump v. Sparkman* have interpreted the Court as requiring a showing of an absence of subject matter jurisdiction to defeat a judge's assertion of immunity. In *Emory v. Peeler,* 756 F.2d 1547, 1553 (11th Cir.1985), the court, upon finding a judicial act, proceeded to the second prong of *Stump's* test: "did the judge's conduct fall clearly outside his subject matter jurisdiction?" Upon finding subject matter jurisdiction, the court considered the jurisdiction prong satisfied and did not inquire into the existence of personal jurisdiction. In *Harper v. Merckle,* 638 F.2d at 857-58, the court noted that *Stump* cast aside considerable debris that tended only to burden analysis and elucidated a cogent two-part test to determine the applicability of judicial immunity: immunity extends to all judicial acts "unless those acts fall clearly outside the judge's subject matter jurisdiction." *See King v. Love,* 766 F.2d 962, 965 (6th Cir.1985) ("A judge acts in the clear absence of all jurisdiction if the matter upon which he acts is clearly outside of the subject matter jurisdiction of the court over which he presides."); *Holloway v. Walker,*

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"grave procedural error" that does not pierce the cloak of immunity.

O'Neil v. City of Lake Oswego, 642 F.2d 367, 369 (9th Cir. 1981); *see also Williams v. Sepe,* 487 F.2d 913 (5th Cir.1973); *McAlester v. Brown,* 469 F.2d 1280 (5th Cir.1972); *Robinson v. McCorkle,* 462 F.2d 111 (3d Cir.), *cert. denied,* 409 U.S. 1042, 93 S.Ct. 529, 34 L.Ed.2d 492 (1972).

765 F.2d 517, 523 (5th Cir.1985) ("Where a judge does not clearly lack all subject-matter jurisdiction, he does not clearly lack *all* jurisdictions. . . .") (emphasis in the original); *Adams v. McIlhany,* 764 F.2d 294, 298 (5th Cir.1985) ("Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes."); *see also DiRuggiero v. Rodgers,* 743 F.2d 1009, 1021 (3d Cir.1984); *Smith v. Bacon,* 699 F.2d 434, 436 (8th Cir. 1983); *White v. Bloom,* 621 F.2d 276, 279 (8th Cir.), *cert. denied,* 449 U.S. 995, 101 S.Ct. 533, 66 L.Ed.2d 292 (1980) and 449 U.S. 1089, 101 S.Ct. 882, 66 L.Ed.2d 816 (1981).[18]

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18. The State of Florida similarly interprets this common law doctrine. *See, e.g., Herskowitz v. Nesbitt,* 419 So.2d 418, 419 (Fla.Dist.Ct. App.1982) (per curiam) (noting that the judge had subject matter jurisdiction in the case and therefore had immunity, citing *Stump); Rivello v. Cooper City,* 322 So.2d 602, 607 (Fla.Dist.Ct.App.1975) ("In the case at bar, there was not a clear absence of all jurisdiction over the subject matter which is necessary before judicial immunity can be abrogated") (citing *Bradley v. Fisher).*

Appellants cite *Farish v. Smoot,* 58 So.2d 534 (Fla.1952), for the proposition that a lack of personal jurisdiction over a party divests a judge of his immunity from suit. In *Farish,* the defendant, a West Palm Beach municipal judge, had allegedly ordered the arrest and imprisonment of the plaintiff notwithstanding the plaintiff's release from prison on a habeas corpus writ issued by the circuit court. In an action for false imprisonment the Supreme Court of Florida affirmed entry of a judgment for the plaintiff, holding that the defendant judge had neither subject matter nor personal jurisdiction and was therefore not entitled to any immunity for his actions. *Id.* at 537. *Farish,* however, does not hold that absence of personal jurisdiction over a party alone subjects a judge to liability, because the judge in that case acted without subject matter jurisdiction as well. Indeed, the case is cited by Florida courts for the rule that absence of subject matter jurisdiction is required to divest a judge's immunity from suit. *See Rivello,* 322 So.2d at 607.

Appellants once again urge the court to adopt the approach adopted by the Ninth Circuit in *Rankin v. Howard*, 633 F.2d 844 (9th Cir.1980), *cert. denied*, 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326 (1981). In *Rankin*, the court held that a judge loses his judicial immunity, regardless of the existence of subject matter jurisdiction, if he or she acts in absence of personal jurisdiction. We view this decision as contrary to Supreme Court and Eleventh Circuit precedent as well as an unwise restriction of a time-tested doctrine.[19]

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19. The Second Circuit in *Green v. Maraio*, 722 F.2d 1013 (1983), ignored the rationale in *Rankin* and found a judge immune from suit even where he acted in the absence of personal jurisdiction:

> Although it may be argued that once Green was sentenced the trial judge no longer had personal jurisdiction over Green and the case, Judge Ingrassia did possess subjectject matter jurisdiction. As demonstrated in *Bradley*, and by the Supreme Court's approving citation of *Bradley* in *Stump*, 435 U.S. at 357 n. 7, 98 S.Ct. at 1105 n. 7, it is apparent that a judge who possesses subject matter jurisdiction is not within the "clear absence of all jurisdiction" posture which would deprive him of the use of the defense of judicial immunity. Judge Ingrassia—assuming, of course, for purposes of this appeal that all the allegations of the complaint are true—was not bereft of all jurisdiction, although such acts would be in excess of his jurisdiction. As explained in *Bradley*, and its progeny, a judge who acts in excess of his jurisdiction is still entitled to rely on the defense of judicial immunity.

Green v. Maraio, 722 F.2d at 1017 (footnotes omitted).

Indeed, even subsequent Ninth Circuit cases have severely limited the holding in *Rankin*. *See O'Neil v. City of Lake Oswego*, 642 F.2d 367 (9th Cir.1981) (failure to comply with procedural requirements of a statute conferring jurisdiction does not result in a loss of immunity); *see also supra* note 15.

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The Court in *Bradley v. Fisher*, identified five policy reasons for judicial immunity: First, and foremost, a judge must be free to act upon his own convictions, without apprehension of personal consequences; second, the controversiality and importance of the competing interests in a case before a court make it likely that the losing party may be overly willing to ascribe malevolent motives to the

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Beard v. Udall, 648 F.2d 1264 (9th Cir.1981), involved facts very similar to the present case. Following an Arizona divorce decree under which the father was awarded custody of the children, the mother moved to another county in the state and began working for a lawyer. While the children were visiting the mother, the lawyer petitioned a judge (in the county of the mother's residence) to modify the original divorce decree and to award custody of the children to the mother. The judge ordered the father to show cause why such relief should not be granted and issued a temporary restraining order preventing the father from removing the children from the county. The father brought a section 1983 action against the judge, in addition to others, and in particular alleged that the judge acted in the clear absence of jurisdiction by failing to follow certain procedural requirements, involving notice and hearing, before issuing the order to show cause and the temporary restraining order. *Id.* at 1267-68. The Ninth Circuit held that:

> The fact that a judge commits "grave procedural errors" is not sufficient to deprive a judge of absolute immunity. *Stump* 435 U.S. at 359, 98 S.Ct. at 1106. Thus, even if Beard's allegations that Judge Greer failed to adhere to the procedural rules established by the Arizona statutes are true, judicial immunity precludes Beard from recovering for this alleged wrongful act.

Id. at 1269.

The present case is essentially identical to *Beard*. Diana did not receive notice or a hearing prior to the entry of the November 22, 1977 dependency and temporary custody order, as required by statute. Thus, even in the circuit in which *Rankin* is binding precedent, Judge Hosemann would have immunity.

judge; third, judges faced with the prospect of defending damages actions and, perhaps, satisfying money judgments would be driven to wasteful and destructive self-protection devices and, moreover, may be less inclined to administer justice; fourth, alternative remedies such as appeal and impeachment reduce the need for private rights of action against judges; and fifth, the ease of alleging bad faith would make a qualified "good faith" immunity virtually worthless because judges would constantly be forced to defend their motivations in court. 80 U.S. (13 Wall.) at 347-54. These factors are still important today. *See Butz v. Economou,* 438 U.S. 478, 508-09, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978).

Withdrawing judicial immunity where a judge has sub ject matter but not personal jurisdiction over a party affected by his ruling conflicts with all of these policies. Unlike questions of subject matter jurisdiction, which generally require only statutory interpretation, personal jurisdiction depends upon facts that a judge is not likely to be able to verify first hand. A judge, for example, would be particularly vulnerable in issuing ex parte restraining orders, *see, e.g.,* Fla.R.Civ.P. 1.610, where time constraints often dictate that he rely on the representations of the party before him in determining whether personal jurisdiction has been or can be obtained over the absent party. Frequently, the question of whether a nonresident can be reached by the court's process cannot be decided until

the litigation is well underway;[20] sometimes the decision is made in a collateral proceeding, after judgment is entered, when, for example, the judgment creditor seeks to levy on the nonresident party's assets. In sum, to require a judge to defend a charge that he knowingly entered an order adversely affecting a party over whom the court had not acquired personal jurisdiction would be to ignore the still valid policy considerations articulated by the Supreme Court in *Bradley v. Fisher*. We accordingly uphold the district court's ruling that Judge Hosemann need not appear and defend appellants' claims against him.

III.

Having disposed of the issue we concluded to be en banc-worthy, we remand this case to the panel that initially considered it for such further consideration as the panel deems appropriate.

AFFIRMED in part and REMANDED to the panel.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part in which FAY and ANDERSON, Circuit Judges, join:

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20. For example, a party may be required to make himself available for deposition, *see* Fla.R.Civ.P. 1.310, or be required to answer interrogatories, *see* Fla.R.Civ.P. 1.340, or even be required to produce or allow others to inspect certain documents in that party's possession, *see* Fla.R.Civ.P. 1.350, all prior to an evidentiary hearing to determine whether personal jurisdiction over the party exists. Indeed, where the defendant declines to appear, the court may enter a default judgment in favor of the plaintiff, *see* Fla.R.Civ.P. 1.500, thus forcing the defendant to expend time and money in collaterally attacking the judgment.

I join in the majority's affirmance of the district judge's dismissal of Judge Hosemann from this case because I find that, in addition to being immune from a section 1983 suit, *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), mandates that the suit against him be dismissed. I dissent, however, from the majority's remand of the case as to the other appellees because I also read *Parratt* as requiring that the claims against the remaining appellees be dismissed, as well.

I view this case as an ordinary abuse of process claim. Diana complains that Buzzy, with the aid of the other appellees, deliberately used a dependency proceeding for a purpose for which it was not designed, i.e., to deprive her of her parental right to the shared custody of her child and to deprive the child of the benefit of such custody. Since Aaron was not a dependent child,[1] Buzzy could not properly invoke Florida's child dependency law to obtain his custody. Buzzy's appropriate recourse under Florida law, if he wanted to obtain sole custody of Aaron, was to sue Diana for divorce and request the court to award him temporary (pending the litigation) and permanent custody of the child. *See* Fla.Stat. § 61.13 (1977).

Florida law provides that the deliberate use of a legal procedure, whether criminal or civil, for a purpose for which it was not designed constitutes a tort, abuse of process. *See Bothmann v. Harrington*, 458 So.2d 1163, 1169 (Fla.Dist.Ct.App. 1984) (an abuse of process action exists when there is "use of the process for an *immediate*

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1. The child was obviously not dependent. *See ante* slip op. p. 783 n. 2 [sic, apparently intending to refer to n. 3 in the majority opinion].

purpose other than that for which it was designed") (emphasis in original) (citing Restatement (Second) of Torts § 682 comment 6 (1977) and W. Prosser, *Handbook of the Law of Torts* § 121 (4th ed. 1971)); *Gause v. First Bank of Marianna,* 457 So.2d 582, 584 (Fla.Dist.Ct.App. 1984); *Peckins v. Kaye,* 443 So.2d 1025, 1026 (Fla.Dist.Ct.App. 1983); *McMurray v. U-Haul Co.,* 425 So.2d 1208, 1209 n. 1 (Fla.Dist.Ct.App. 1983) ("'In order to sustain an action for abuse of process two elements are essential, (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge") (quoting *Farmers Gin Co. v. Ward,* 73 N.M. 405, 406, 389 P.2d 9, 11 (1964)).[2]

If Diana's factual allegations are true, Buzzy and those who conspired with him are liable to her, in her individual and representative capacities, in money damages for the injuries she and Aaron sustained. Diana has not sued them for abusing Florida's dependency procedure, however. Rather, invoking section 1983 she seeks compensation for such injuries under the theory that the State of Florida denied her and Aaron the due process of law

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2. *See also Cline v. Flagler Sales Corp.,* 207 So.2d 709, 711 (Fla.Dist.Ct.App.1968) (per curiam):

> In an action for abuse of process it is not essential to show a termination of the proceeding in favor of the person against whom the process was issued and used, or to show want of probable cause or malice. The cause of action consists of the willful or intentional misuse of process; a willful and intentional misuse of it for some wrongful and unlawful object, or ulterior purpose not intended by the law to effect.

guaranteed them by the fourteenth amendment.[3] Her theory is foreclosed by *Parratt.*

In *Parratt,* Nebraska prison officials failed to follow normal procedures for receipt of packages mailed to prisoners and lost a prisoner's hobby kit. The prisoner sued the officials under section 1983 to recover the value of the lost hobby kit, alleging that the officials, acting for the state, had deprived him of his property without due process of law in violation of the fourteenth amendment.[4] The district court entered summary judgment for the prisoner, and the court of appeals affirmed. The Supreme Court, noting that the fourteenth amendment protects only against deprivations without due process of law, focused on the question of what process was due the prisoner. *Parratt,* 451 U.S. at 537, 101 S.Ct. at 1914. The Court first observed that the prison officials' action was random and not sanctioned by the state. Because the state could not have anticipated such random activity, it would have been impossible for the state to have provided the prisoner any process, such as a hearing, prior to the deprivation. Nebraska law, however, did provide the prisoner a make-whole damages remedy. Finding that the damages remedy was all the process the state could have provided him un-

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3. The fourteenth amendment due process clause provides that no state may "deprive any person of life, liberty, or property, without due process of law."

4. This action was alleged to be negligent. 451 U.S. at 530, 101 S.Ct. at 1910. The Court's analysis in *Parratt,* however, has been extended to intentional deprivations. *See Hudson v. Palmer,* — U.S. —, 104 S.Ct. 3194, 3203-04, 82 L.Ed.2d 393 (1984).

der the circumstances, the Court concluded that the prisoner had not been deprived of his property without due process of law. *Id.* at 541-44, 101 S.Ct. at 1916-17.

Parratt thus stands for the proposition that, where state law provides a make-whole damages remedy to a person whose property has been taken or destroyed by the random tortious conduct of a state agent, the state has accorded that person all the process he is due under the fourteenth amendment due process clause simpliciter. In other words, *Parratt* treats the claimant as if he had already been compensated in full by the state for his loss and therefore accorded due process.

Parratt has been extended by the better reasoned opinions to apply to deprivations of liberty as well as property interests. *See, e.g., Wilson v. Beebe,* 770 F.2d 578, 584 (6th Cir. 1985) (en banc); *Thibodeaux v. Bordelon,* 740 F.2d 329, 337-38 (5th Cir.1984); *Daniels v. Williams,* 720 F.2d 792, 794-96 (4th Cir.1983); *Ellis v. Hamilton,* 669 F.2d 510, 515 (7th Cir.), *cert. denied,* 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982); *Rutledge v. Arizona Board of Regents,* 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds,* 460 U.S. 719, 103 S.Ct. 1483, 75 L. Ed.2d 413 (1983). *But see Brewer v. Blackwell,* 692 F.2d 387, 394 (5th Cir.1982). Certainly *Parratt's* reasoning is unaffected by which fourteenth amendment interest is deprived. A state's inability to provide predeprivation process, because the action of the state employee was unauthorized and random, exists regardless of which due process interest is involved. Furthermore, adequate damages remedies may be available not only for property interests but also for liberty and life interests. *See Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 395, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971) ("[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"); *Thibodeaux v. Bordelon*, 740 F.2d at 338. Finally, the Court in *Parratt* implicitly acknowledged the applicability of its rationale to deprivations of liberty interests by its discussion of *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). *Ingraham* was a section 1983 class action brought on behalf of school children who alleged a deprivation of liberty without due process of law when their public school teachers paddled them for disciplinary reasons without providing them a prior hearing. The Court acknowledged the children's liberty interest but noted that an adequate damages remedy, in the form of a suit for the tort of assault and battery, existed in state law. Recognizing that a hearing prior to each school paddling was impractical, the Court concluded that the state remedy was the only process required. *Ingraham*, 430 U.S. at 674-82, 97 S.Ct. at 1414-18. By drawing on *Ingraham*, the Court indicated that *Parratt* was designed to apply to liberty interests such as those involved in this case.

In my view, *Parratt* requires the dismissal of this 1983 suit. This case tracks *Parratt* in all its essential elements: (1) appellants seek money damages;[5] (2) only

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5. Where injunctive rather than monetary relief is sought, *Parratt* does not apply. In such a situation the suit is normally brought prior to the deprivation, thereby putting the state on

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violations of fourteenth amendment due process simpliciter rights are alleged;[6] and (3) the act of which appellants complain, the appellees' misuse of Florida's dependency law,[7] was to the extent of the state's involvement through Judge Hosemann, random conduct not sanctioned by the state. Quite to the contrary, the state condemned such conduct by subjecting appellees Buzzy Dykes, Judge Dykes, Thomas Weinberg, and Kenneth McIntosh to possible tort liability in the form of a damages action for abuse of process and Judge Hosemann to possible criminal liability, *see* Fla.Stat. § 839.25 (1983),[8] discipline (including removal from office), *see* Fla.Const. art. V, § 12, or impeachment, *see* Fla.Const. art. 111, § 17. In addition, Judge

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notice of the acts its employees plan to take. State resistance to the granting of injunctive relief serves to sanction its employees' acts making postdeprivation remedies insufficient under *Parratt's* rationale to satisfy the requirements of due process.

6. Appellants allege no substantive constitutional claims. As the panel stressed, "appellants only argue that their rights to procedural due process were violated by the appellees individually and as a part of a conspiracy, and have apparently abandoned their equal protection and substantive due process claims."

7. The "color of state law" component of section 1983 may be satisfied by a showing that a judicial act of the defendant judge resulted from a corrupt conspiracy involving the judge and private parties. Although the judge may be immune from suit, the private parties who conspired with him act "under color of state law" for purposes of section 1983 suits. *See Dennis v. Sparks*, 449 U.S. 24, 27-29, 101 S.Ct. 183, 186-87, 66 L.Ed.2d 185 (1980).

8. Judge Hosemann's alleged conduct could also result in the loss of his employment benefits. *See* Fla.Stat. § 112.3173 (Supp.1984).

Hosemann's dependency order was subject to modification or vacation (if, for example, Diana, after learning of the order's entry appeared to contest it), *see* Fla.Stat. § 39.11 (3) (1977), or reversal on appeal, *see* Fla.Stat. § 39.14(1) (1977).

Appellants might argue that *Parratt* does not foreclose their suit against Judge Hosemann because the state, in applying its doctrine of judicial immunity,[9] failed to

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9. *See Herskowitz v. Nesbitt*, 419 So.2d 418, 419 (Fla.Dist.Ct. App.1982) (per curiam); *Rivello v. Cooper City*, 322 So.2d 602, 607 (Fla.Dist.Ct.App.1975).

One must distinguish between the judicial immunity a state judge would raise in defense of an abuse of process suit and the immunity he would interpose in defense of a section 1983 suit. In the former instance, the scope of immunity would be determined by state law. In the latter case, federal law must be applied. In *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409, 63 L.Ed.2d 673 (1980), the Supreme Court in addressing the issue of immunity in a section 1983 context, stated:

> In each of these cases [involving immunity from section 1983 liability], our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." . . . Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatiable with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.

(quoting *Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976)). As the Court had previously noted: "'A construction of [§ 1983] which permitted a state immunity defense to have controlling effect would transmute a basic [constitutional] guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . . The immunity claim raises a question of federal law.'" *Martinez v. Cali-*

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provide them a make-whole damages remedy against him. In short, the state has not accorded the process appellants

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fornia, 444 U.S. 277, 284 n. 8, 100 S.Ct. 553, 558 n. 8, 62 L.Ed.2d 481 (1980) (quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir.1973) (citation omitted), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974)).

In the case of judicial immunity of federal judges one could argue that the doctrine is grounded in article III of the Constitution and it therefore could not be subject to statutory modification. In an effort to ensure the independence of the judiciary, the framers of the Constitution, in article III, section 1, provided that federal judges enjoy life tenure and mandated that their compensation not be diminished. The doctrine of judicial immunity achieves the same end; by insulating judges from monetary liability for their judicial acts in a case over which they had subject matter jurisdiction, the doctrine frees judges from certain pressures that may inappropriately affect their administration of justice and further secures the independence of the judiciary. Indeed, the Court in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 537, 19 L.Ed. 285 (1869), hinted at the constitutional underpinnings of the doctrine by describing judicial immunity in conjunction with a judge's life tenure:

> In the United States, judicial power is vested exclusively in the courts. The judges administer justice therein for the people, and are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. . . . But responsible they are not to private parties in civil actions for their judicial acts, however injurious may be those acts, and however must they may deserve condemnation. . . .

The Court's decision in *Pierson v. Ray* is not to the contrary. That case held that Congress did not intend to abolish the judicial immunity of state judges in enacting section 1983. 386 U.S. at 554-55, 87 S.Ct. at 1218. This does not suggest that Congress could abolish the judicial immunity of federal judges, as section 1983 does not apply to such judges and the protection accorded federal judges under article III does not extend to state judges.

are due. The rationale of *Parratt* is based upon an inquiry into what process is due. With respect to Judge Hosemann, then, the question is whether Florida's immunization of judges from suit and the corresponding absence of a tort remedy for judicial wrongs provides an injured party less process than he is due. I find that it does not.

Courts have consistently upheld the use of judicial immunity in section 1983 suits. *See Dennis v. Sparks,* 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980); *Supreme Court v. Consumers Union of the United States, Inc.,* 446 U.S. 719, 734-35, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641 (1980); *Stump v. Sparkman,* 435 U.S. 349, 355-56, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978). In *Pierson v. Ray,* 386 U.S. 547, 554-55, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967), the Court found no indication that Congress, in enacting section 1983, intended to eliminate the doctrine of judicial immunity. These cases clearly imply that judicial immunity is constitutionally permissible and that the resulting absence of an action for money damages to remedy a judge's tortious conduct does not violate the injured party's due process rights. *See also Martinez v. California,* 444 U.S. 277, 281-83, 100 S.Ct. 553, 557-58, 62 L.Ed. 2d 481 (1980) (state does not deny due process simply by granting reasonable tort immunity to state entities and officials). This being so, a state accords an injured party all of the process he is due even though it immunizes its judges from suit. *See Rittenhouse v. DeKalb County,* 764 F.2d 1451, 1456-58 (11th Cir.1985) (involving statutorily created municipal immunity). Because Florida's immunization of Judge Hosemann from tort damages did not

violate appellants' due process rights, *Parratt* requires that the section 1983 suit against him be dismissed.

In summary, *Parratt* mandates this section 1983 suit be dismissed as to all of the appellees. This should not be surprising for, when a state provides all the process possible, it is difficult to interpret the fourteenth amendment as requiring more.

HATCHETT, Circuit Judge, Dissenting:

On the difficult issue presented in this case, the scope of judicial immunity in a suit for damages under 42 U.S.C. § 1983, the law in the Eleventh Circuit is now made clear. The en banc court holds that judicial immunity is complete, unqualified, and without exception. According to the majority, judicial immunity even protects a judge who acts without subject matter jurisdiction, without personal jurisdiction, and who unlawfully *conspires* with a party *to violate another party's federal constitutional rights.* As the majority concedes, no precedent, Supreme Court or otherwise, requires such a broad definition and application of the judicial immunity doctrine. Contrary to the majority's view, no policy considerations justify such a result.

More importantly, the majority's opinion implicitly repeals one third of a congressional enactment specifically designed to protect the federal constitutional rights of citizens from deprivations by state officers, including judges. In 42 U.S.C. § 1983 (1982), Congress provided:

> *Every person who,* under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to *the deprivation of any rights,*

> *privileges, or immunities secured by the Constitution and laws, shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [Emphasis added.]

With the filing of the majority opinion, this important enactment for the protection of citizens of the United States may as well read: "Every person, [except a judge in Florida, Georgia and Alabama] . . . ." Judges in these former states of the confederacy will be able to deal willy nilly with the rights of citizens without having to account for willful unconstitutional actions. This important congressional enactment is amended by this opinion to apply only to state officials in the legislative and executive branches. It is another whittling away of section 1983's application. I respectfully dissent.[1]

To demonstrate the scope of the majority's opinion, assume that women and minorities are picketing a city council meeting to influence the city council's vote on the paving of streets and the availability of jobs in municipal government. Assume further that a judge, dissatisfied with this method of expression of a grievance, instigates a meeting with the mayor at which the judge and the mayor conspire to end the lawful demonstration. Assume also that the judge, knowingly acting without jurisdiction and with knowledge that the demonstration is lawful, causes the demonstrators to be arrested, incarcerated, held without bail, and submitted to a trial. Under this en banc opinion,

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1. This case also points up the reason citizens and legislators are increasingly demanding that lawyers and judges charged with ethical violations be judged not by other lawyers and judges under the "good ole boy" system, but by persons outside the legal profession.

no action for damages may be brought against the judge in the Eleventh Circuit.[2]

If the judicial action inflicts the intended damage by killing the demonstrators' political momentum, making injunctive relief useless, the victims will lack any remedy for the violation of their rights. In a state with a political climate which is hostile to freedom of association, a judge could repeatedly interfere with constitutional rights without being held accountable. This hypothetical may seem far fetched, but it is not; this is the exact fact pattern that section 1983 was enacted to address and which it has addressed since its enactment.

It is difficult to understand how every person in the United States may be held accountable in damages for conspiring to violate another person's federal constitutional rights, except those persons trained in constitutional guarantees, charged with interpreting the constitution, and oath bound to deal fairly with parties to litigation.

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2. Bear in mind that under *Scott v. Dixon*, 720 F.2d 1542 (11th Cir.1983), a court clerk issuing an arrest warrant is acting in a judicial capacity and entitled to absolute immunity. With this opinion, the en banc court places the constitutional right of every citizen in this circuit at the mercy of any person acting in a quasi-judicial capacity. I can only hope that the court will limit the reach of the absolute immunity it now accords judges to the level of a general jurisdiction court and not extend it to clerical workers.

APPENDIX D

Diana Christine DYKES, et al., Plaintiffs-Appellants,

v.

A.J. HOSEMANN, Jr., etc., Thomas A. Weinberg, etc., Roger Francis Dykes, Sr., etc., Roger Francis Dykes, Jr., etc. and Kenneth W. McIntosh, etc., Defendants-Appellees.

No. 83-3347

United States Court of Appeals,
Eleventh Circuit.
March 3, 1986.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

ON REMAND FROM EN BANC COURT, 776 F.2d 942 (11/18/85) ON PETITIONS FOR REHEARING

PER CURIAM:

The en banc court decided the judicial immunity issue, 776 F.2d 942, and remanded the case to this panel for such further consideration as the panel deems appropriate.

Pursuant to petitions for rehearing filed by defendants other than Judge Hosemann, the panel has reconsidered its decision.

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* Honorable Homer Thornberry, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

The petition for rehearing of Kenneth W. McIntosh is GRANTED and with respect to him the judgment of the district court is AFFIRMED.

The petitions for rehearing of Roger Francis Dykes, Roger Francis Dykes, Jr., and Thomas A. Weinberg are DENIED.

The opinion of the panel, 743 F.2d 1488, is REINSTATED except to the extent that it decided the issue of Judge Hosemann's judicial immunity and decided the issue of McIntosh's appeal, and the dissent of Judge Hill is reinstated except to the extent that it concerns Judge Hosemann and Kenneth W. McIntosh.

HILL, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's order insofar as it affirms the decision of the district court with respect to appellants Hosemann and McIntosh. I dissent from the remainder of the order.

I recognize that my opinion dissenting from the panel opinion in this case has been reinstated, except to the extent that it addresses the appeals of Judge Hosemann and Kenneth W. McIntosh. I adhere to what I wrote then and offer the following additional comments.

The panel opinion, which has been reinstated insofar as it concerns the other appellants, discusses in only a cursory and conclusory fashion the voluminous deposition testimony and other materials on which the district judge relied when he found that there was no genuine conflict in the facts and granted summary judgment in favor of all of the defendants. The district court carefully reviewed

somewhere in the neighborhood of 1,000 pages of deposition testimony and extensive affidavits and concluded that the undisputed facts did not support the plaintiffs' conclusory allegations of a conspiracy to violate their constitutional rights. My review of the record persuades me that the district judge was correct.

Regarding appellee Weinberg, the panel opinion finds him not to have addressed satisfactorily appellants' *contention* that Weinberg acted as part of the alleged conspiracy. The majority observes that he could be held liable on such a theory "if he reached an understanding with the other appellees to violate Diana's constitutional rights." *Dykes v. Hosemann,* 743 F.2d 1488, 1498 (1984). It is further observed that Weinberg, on his day off, conferred with Buzzy Dykes; that HRS official Kenneth Lofback (who worked under Weinberg) felt that it would not be proper for HRS to file a dependency petition under the circumstances of the case; that Weinberg was present before Judge Hosemann when Buzzy Dykes and Judge Dykes sought some relief from Diana's violation of the custody order and otherwise discussed the situation. The uncontroverted evidence shows that when Buzzy sought the aid of HRS in instituting a dependency proceeding, Lofback did indeed conclude that the department ought not proceed. He called on Weinberg, however, his superior, for a second opinion, and Weinberg came into Lofback's office. There, instead of formulating a conspiracy to use HRS to aid Buzzy, Weinberg agreed with Lofback that the circumstances did not justify intervention by the department. HRS does not presume to judge, however, whether an applicant is likely to succeed in a dependency petition. As is the duty of the department, Weinberg ad-

vised Buzzy that he might file a petition on his own and showed Buzzy how to complete a form petition. Conspirators might have falsified the information on that petition. Weinberg did not do so. The information that had been given to the department, which Weinberg had deemed insufficient to justify action on his part, was faithfully and accurately transcribed onto the petition.

Later, when a custody order had been entered by Judge Hosemann vesting temporary custody in Buzzy, Diana spirited the child away to Maryland. The meeting that is said in the panel opinion to constitute evidence supporting appellants' allegations of a conspiracy was an application by Buzzy to the judge who had granted the temporary custody order for relief from its violation. Judge Hosemann sent for Weinberg, whose department, by statute, must consult with domestic relations judges in custody matters, to advise the judge whether Maryland had enacted a uniform child custody act. Weinberg did not know, but he undertook to find out and inform the judge of what he discovered. Judge Hosemann apparently wished to learn whether a custody order issued by a Florida court would be recognized in Maryland. As I read the panel opinion, we hold these undisputed facts to make out a case of conspiracy to deprive Diana of her constitutional rights sufficient to submit the case against Weinberg to the jury. I do not agree.

Regarding Judge Dykes, Buzzy's father, the panel observes that the judge did some legal research and made some notes on the law that might have been helpful to his son in petitioning for custody or some other relief. The panel opinion then states that "[t]hese notes, in addition

to other testimonial and circumstantial evidence in the record convince us that triable fact issues exist as to Judge Dykes' participation in a conspiracy to deprive the appellants of their constitutional rights." 743 F.2d at 1498. The court thus states that if a father assists his son in seeking redress from the courts, that fact, in combination with something else as yet unstated, makes out a case of conspiracy on his part to deprive Diana's constitutional rights. I do not agree.

Regarding Buzzy Dykes, the panel opinion observes that Buzzy went to Weinberg and provided him with the information upon which a dependency petition was sought; that he went to the judge who had granted him custody of his son when Diana spirited the child away; and that when Judge Hosemann issued an order that he hoped would be respected by the Maryland courts in this dispute, Buzzy took the order to Maryland and regained physical custody of the child. As I read the court's opinion, we hold that if a litigant takes these steps in furtherance of litigation he has commenced, a case is made out that is sufficient to allow a jury to find him a member of a conspiracy to deprive one of her civil rights. I do not agree.

In my view, the reinstated portions of the panel opinion fail to indicate with sufficient precision where the majority believes the district court erred in its sifting and analysis of the depositions and affidavits in the record. I fear that this is because the panel majority may have been moved more by the hyperbolic allegations of the plaintiffs' complaint (as opposed to the evidence in the record) than the opinion admits. The unfortunate result of our decision, as I apprehend it, is that if the evidence pre-

sented to the district judge and, on this appeal, to us is presented at trial, the district judge would be bound by the law of this case to submit that evidence to a jury. If that is to be the result of our decision, I believe we owe the parties and the district judge a better explanation than we have so far provided of what evidence we have discovered, overlooked by the district judge, that, in our judgment, creates a conflict which, if resolved in appellants' favor, would authorize a plaintiffs' verdict. I find none.

Criminal conspiracy has been said to be the "darling of the modern prosecutor's nursery." *Harrison v. United States,* 7 F.2d 259, 263 (2d Cir.1925) (L. Hand, J.). *See also Krulewitch v. United States,* 336 U.S. 440, 453-54, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring). We have now found counsel's sweeping assertions of dark conspiratorial conduct, supported by facts evidencing nothing more than the reasonable efforts of one litigant to prevail over his opponent and the proper discharge, by a public official, of the duties imposed upon him by law, sufficient to make out a claim for relief under section 1983. I fear that, as a result, the prosecutor's "darling" will become the civil litigator's "dearest."

I dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3347

D.C. Docket No. 79-00471

DIANA CHRISTINE DYKES, ET AL.,

Plaintiffs-Appellants,

versus

A. J. HOSEMANN, JR., ETC., THOMAS A. WEINBERG, ETC., ROGER FRANCIS DYKES, SR., ETC., ROGER FRANCIS DYKES, JR., ETC., AND KENNETH W. McINTOSH, ETC.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(Filed May 9, 1986)

Before GODBOLD, Chief Judge, HILL, Circuit Judge, and THORNBERRY*, Senior Circuit Judge.

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* Honorable Homer Thornberry, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

JUDGMENT ON REHEARING

This cause came on to be heard on defendants-appellees' petitions for rehearing;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED as to defendants, A. J. Hosemann, Jr. and Kenneth W. McIntosh; and as to defendants, Roger Francis Dykes, Sr., Roger Francis Dykes, Jr., and Thomas A. Weinberg the judgment is REVERSED and REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that the costs of appellees Hosemann and McIntosh be taxed against appellants and that the costs of appellants be taxed against the remaining appellees.

HILL, Circuit Judge, concurred in part and dissented in part and filed an opinion.

Entered: March 3, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/

Deputy Clerk

ISSUED AS MANDATE:

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA ORLANDO
DIVISION

No. 79-471-Orl-Civ-Y

DIANA CHRISTINE DYKES,

Plaintiff,

vs.

THOMAS A. WEINBERG, et al.,

Defendants.

MEMORANDUM OPINION

(Filed Apr. 15, 1983)

This cause is before the Court on the motions of the defendants, Roger Francis Dykes, Sr., Roger Francis Dykes, Jr., and Thomas A. Weinberg, for summary judgment. In an order entered January 8, 1982, the claim of plaintiff Aaron Matthew Dykes was dismissed with prejudice and the ruling on defendants' motions for summary judgment as to the claim of Diana Christine Dykes was stayed pending the Court's review of the depositions filed in this case. After a review of the depositions the Court requested E. Thom Rumberger, attorney for defendants Dykes, Sr. and Dykes, Jr., to furnish a copy of the state court files of the custody proceedings in *Dykes* v. *Dykes,* including the appellate files. This request was honored and the files have been reviewed and considered by this Court.

The following material facts are undisputed:

I.

Diana Dykes aand Roger Francis Dykes, Jr. ("Buzzy") were married in Phoenix, Maryland on June 30, 1973, and lived in Florida for the first two years of their marriage. Their son, Aaron, was born on November 18, 1974. In December of 1975, the Dykes moved to Maryland and then in June of 1976, to Pennsylvania. While they were living in Pennsylvania, Diana had a part-time job and Buzzy was attending college.

In 1977, the couple were having marital problems and had been seeing a counselor. Buzzy believed that Diana was seeing another man. Diana denies any wrongdoing but admits that this was a bone of contention. They also argued frequently about Buzzy's progress in college and his poor grades.

Before Thanksgiving of 1977, Buzzy decided to withdraw from school and go to stay with his father, Judge Dykes,[1] in Brevard County. Buzzy informed Diana that he was going to take Aaron with him to his father's home and asked Diana to accompany them. Diana helped them pack but decided to remain in Pennsylvania. Diana was unhappy because Buzzy and Aaron left on November 15th, just three days before Aaron's third birthday and Aaron missed the party she had planned.

Buzzy's parents had been concerned for some time about the couple's marital difficulties. When Judge Dykes called Pennsylvania the night of November 15th, Diana

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1 A State of Florida Circuit Judge (a trial judge of general jurisdiction).

advised him that Buzzy and Aaron were on their way down to Florida. Diana spoke with Buzzy over the telephone on the 17th, the day they arrived in Florida. Buzzy's parents were upset about Buzzy's separation from Diana. Buzzy and his parents were all concerned that Diana would try to come and take Aaron back with her, a fear which was later proven to be correct. Buzzy was determined to take some kind of action to protect Aaron from being abducted and discussed the problem with his father.

Judge Dykes called the Juvenile Court to familiarize himself with the proceedings which could give Buzzy temporary custody of Aaron. Judge Hosemann, the Juvenile Judge, told Judge Dykes that a dependency petition[2] was usually handled through an intake officer at Health and Rehabilitative Services (HRS). Judge Dykes accompanied Buzzy to the neighborhood HRS office early in the evening on November 21st. There they met with Mr. Kendrick Lofback. Buzzy explained that he feared for Aaron's safety, and asked if there was anything that HRS could do to assist him. Mr. Lofback called his supervisor, Mr. Thomas Weinberg, to find out exactly how to proceed with Buzzy's request. Both Mr. Weinberg and Mr. Lofback felt that this was not an appropriate petition for the agency to file. Mr. Lofback suggested that he could help Buzzy write the petition and Buzzy could then file it in his own name. Mr. Weinberg agreed that the HRS

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2 In 1977 this procedure was established by Section 39.05 Florida Statutes. In 1978 the Florida State Legislature revised Chapter 39 and it became known as the "Florida Juvenile Justice Act", with new sections effective October 1, 1978. The procedure for filing a dependency petition is now established by Section 39.404, Florida Statutes.

could at least assist in filling out the petition since Buzzy appeared to have legitimate concern for Aaron's welfare.

The next morning Mr. Weinberg took the petition to the police station which was being used as the courthouse while the new courthouse was under construction. Buzzy met him there and signed the petition. Mr. Weinberg then accompanied Buzzy in presenting the petition to Judge Hosemann in chambers. Judge Hosemann testified that it was customary for him to receive dependency petitions in chambers. After reading the petition, Judge Hosemann issued an order adjudicating Aaron to be a dependent child and giving temporary care, custody and control to Buzzy. Diana was not served with notice of the dependency petition and had no opportunity to appear before the order was issued.

Buzzy called Diana a day or so later and informed her that he had a court order that Aaron could not be taken out of Florida. Although Diana contends that she never received official notice and did not learn of the contents of the order until January 30, 1978, she admits that Buzzy told her during that telephone conversation that an order had been granted.

Plaintiff claims that Judge Hosemann had no subject matter jurisdiction to grant the order since Aaron was not a "dependent" or "delinquent" within the meaning of Chapter 31, Florida Statutes. Whether in fact the order was subject to reversal does not obviate the fact that Judge Hosemann, who entered the order, was sitting as a juvenile judge and it was a case presented to him within his jurisdiction.

Shortly after entry of the order, Diana and Buzzy closed up their Maryland apartment and Diana came back with Buzzy to Florida. They first stayed in Judge Dykes' home with the judge and his second wife (Buzzy's stepmother). Later they moved in with Buzzy's mother, Marilu.[3]

Diana stayed in Florida until the end of January 1978, when she decided to take Aaron with her to her parents' home in Maryland. Diana told no one she was leaving because she was afraid that someone in Buzzy's family would try to stop her. Instead, she left a note for Marilu telling her that they had gone to the beach and then Diana and Aaron flew to Maryland and went to stay with Diana's parents.

After Diana left, Judge Dykes accompanied Buzzy to the Juvenile Court office to try to locate Mr. Weinberg. Buzzy was hopeful that Mr. Weinberg could help in contacting the Maryland authorities handling custody matters and could enlist their help to locate Aaron. Apparently Judge Dykes, Buzzy, Tom Weinberg, Michael Dea, another HRS employee, and Judge Hosemann met in Judge Hosemann's chambers and discussed the possibility of getting Aaron returned to Florida. Of the five, Judge Hosemann was the only one who did not recall that the meeting took place.

On January 27, 1978, in connection with a petition filed by Buzzy for dissolution of marriage, State of Florida Circuit Judge Muldrew issued an order giving temporary custody to Buzzy and directed Diana to turn over custody of Aaron to Buzzy. Diana also filed a complaint

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[3] The first Mrs. Dykes, who was divorced from Judge Dykes.

in Maryland seeking custody and alimony. On January 30, Buzzy obtained a custody order from the Maryland Circuit Court in Baltimore. That night Buzzy and several other individuals served Diana with the petition for dissolution of marriage and the Maryland Circuit Court order. Diana then surrendered custody of Aaron to Buzzy.

Judge Muldrew issued an order on February 22, 1978 which granted further temporary custody of Aaron to Buzzy and ordered that a social investigation be conducted and filed with the court within 60 days. Mary Rodon, the social worker on the case, filed the social investigation with the court in November of 1978, some eight months later. Plaintiff contends that Judge Dykes and others directed Ms. Rodon to delay in finalizing the report in order to work to Diana's detriment in regaining custody.

Ms. Rodon testified that in the majority of her cases a social investigation will take five months, depending on her total caseload and the difficulty in the individual case of contacting references. She stated that out-of-state cases take longer and it was normal for one to last more than seven months. As was the custom, Ms. Rodon waited for the Maryland and Pennsylvania investigations, which she received in August, before conducting the local investigation. In September, October and November she completed her local interviews, did the home study, ordered Buzzy's psychological examination and ordered Aaron's medical examination. Ms. Rodon's final social report made no custody recommendation, but left that decision up to the judge.

On August 15, 1978, Judge Muldrew issued a final judgment of dissolution of marriage. Then on February

22, 1979, Judge Muldrew entered a final judgment granting permanent custody of Aaron to Buzzy.

II.

Plaintiff brings this action under 42 U.S.C. § 1983. Action taken "under color of state law" is an essential element of any suit brought under this statute and it is well settled that 42 U.S.C. § 1983 does not reach purely private conduct. *District of Columbia v. Carter*, 409 U.S. 418, *reh. denied*, 410 U.S. 959 (1973); Parker v. Graves, 479 F.2d 335 (5th Cir. 1973).

Apparently plaintiff argues that either defendants' participation in state court litigation and/or what plaintiff claims is Judge Dykes' use of his office to obtain the temporary custody order for Buzzy translate into action under color of state law.

The Fifth Circuit has repeatedly held that use of the state's judicial processes by private litigants does not constitute action taken under color of state law. *Dahl v. Akin*, 630 F.2d 277 (5th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981);[4] *Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974);

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[4] In *Dahl*, a daughter, fearing diversion of her father's estate if he were to remarry, represented to the Texas court, ex parte, that her father was incompetent and succeeded in having herself appointed as guardian. Then, again ex parte, she petitioned the court to issue a writ directing that the father be institutionalized, which the court did. "Thus armed with less process than would be necessary to seize a refrigerator . . . Texas peace officers dragged Dahl from his home and deposited him with a Presbyterian hospital in Dallas." *Id.* at 279. The Fifth Circuit held that plaintiff had been deprived of liberty and property without due process but that the daughter's conduct in initiating court proceedings did not constitute action taken "under color of" state law. *Id.* at 281.

Henry v. First National Bank of Clarksdale, 444 F.2d 1300 (5th Cir. 1971), *cert. denied,* 405 U.S. 1019, *reh. denied* 406 U.S. 963 (1972). Thus plaintiff's argument that defendants' participation in state court litigation constituted action under color of state law can easily be dismissed.

Alternatively, plaintiff contends the requisite element of action under color of state law is present because Judge Dykes and/or Weinberg used their positions to obtain the temporary custody order for his son.

The only documentary evidence which plaintiff has presented in support of her claim concerning Judge Dykes are six pages of Xerox copies of handwritten and typewritten notes which the plaintiff found in a filing cabinet in Buzzy's apartment. It is undisputed that several of the notes are in Judge Dykes' handwriting. One note, marked with the caption "notes made back in Nov.", and written by Judge Dykes is similar in writing to the language contained in the dependency petition which Buzzy filed on November 22, 1977. The other notes apparently were written after January 23, 1978 when Diana returned with Aaron to Maryland and January 30, 1978 when Diana surrendered custody of Aaron to Buzzy since they refer to Buzzy's upcoming trip to Maryland and attorney Ken McIntosh's legal research with regard to the Uniform Child Custody Jurisdiction Act.

At most, these notes show that Judge Dykes was aware of his son's marital problems and knew of the preparations that Buzzy was making for his January 30 trip to Maryland. There is no indication that, as Diana alleges, there was a plan devised by Judge Dykes and Buzzy for Judge Dykes to utilize his position to wrongfully insure Buzzy's custody of Aaron, nor do the notes

evidence judicial impropriety or undue influence on the part of Judge Dykes.

A careful reading of the state court proceedings in *Dykes v. Dykes* shows that Diana presented her claim of judicial impropriety and undue influence to the Brevard County Circuit Court, to the Fifth District Court of Appeal, and to the Florida Supreme Court. This is the same issue which she raises now in Federal Court. All the Florida state courts decided the issue adversely to Diana.

The state decisions would seem to put the matter to rest but in the case at bar this Court has gone further in its consideration of plaintiff's claim. A review of all eighteen depositions submitted, totalling over one thousand pages of testimony, does not disclose any judicial impropriety or undue influence on the part of Judge Dykes. Plaintiff has presented no evidence that Judge Dykes used his office or acted in his official capacity to obtain the temporary custody order for his son. It is true that he is a judge, but he is also a father with a natural concern for his son's and grandson's welfare. Judge Dykes had a right to assist Buzzy in ironing out the younger Dykes' marital difficulties so long as he did not assert the influence of his office. Plaintiff contends that the mere fact that Buzzy's father was a judge and Buzzy discussed his problems with him means that there was improper use of his office. If that were true, Judge Dykes could perform no normal functions as a father or citizen without fear of a Section 1983 suit. Clearly, Judge Dykes' actions were not "judicial acts" and the essential element of state action is missing in this Section 1983 suit to the extent such claim rests on the alleged participation of Judge Dykes.

As for defendant Weinberg, plaintiff alleges that he, acting in his official state position as District Intake Supervisor with the Brevard County division of the Florida Department of HRS, deprived plaintiff of procedural and substantive due process and equal protection under the law. During their depositions, both Weinberg and Kendrick Lofback, the Intake Counselor on duty the evening of November 21, 1977, testified that the usual and customary practice at HRS was to assist persons wishing to file dependency petitions when HRS counselors did not feel that there were sufficient grounds for HRS to initiate a petition. An HRS counselor would help in preparing the petition and in presenting the petition to the judge. Plaintiff has presented no evidence to show that the procedure followed in the preparation and presentation of Buzzy's petition was a departure from such routine. On January 26, 1978, during the meeting in Judge Hosemann's chambers, Weinberg and the others present discussed what effect the Uniform Child Custody Act would have on any attempt of Buzzy to regain custody of Aaron. Weinberg, at Judge Hosemann's request, called Maryland to ask whether that state would honor a Florida custody order. Weinberg states that that was the extent of his involvement with the matter and plaintiff has presented no evidence to the contrary.

The evidence shows that in November of 1977, defendant Weinberg simply assisted Buzzy in preparing and submitting Buzzy's petition, just as Weinberg would have helped any other member of the public. Then in January of 1978, Weinberg performed one of his duties as an employee of HRS by advising Judge Hosemann, a juvenile court judge, on a custody matter.

In his answer defendant Weinberg asserted the affirmative defense of qualified immunity and now raises that defense again in support of his motion for summary judgment. In *Scheuer v. Rhodes,* 416 U.S. 232 (1974), the Supreme Court held that a state executive official enjoys a qualified immunity for acts which fall within the scope of that official's discretion and responsibilities. In addition, any claim of qualified immunity must be based on " the existence of reasonable grounds for the belief formed at the time" of the official's act "coupled with good-faith belief" that the act would not result in deprivation of plaintiff's constitutional right. *Id.* at 247-48.

Up until last year, an official's "good faith" had to be measured by both an "objective" and "subjective" standard.

In *Harlow v. Fitzgerald,* 73 L. Ed. 2d 396 (1982), the Supreme Court did away with the subjective standard and stated that "good faith" should be measured only by "the objective reasonableness of an official's conduct." *Id.* at 410.[5] The Court recognized that use of the subjective "good faith" standard had almost entirely precluded the dismissal of even insubstantial constitutional claims without trial. The Court emphasized that abandonment of the subjective standard will "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Id. at 410. The Court held that "government officials performing discre-

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[5] Even though *Harlow* involved federal, not state officials, the immunity principles articulated in *Harlow* are equally applicable to the instant case. In *Butz v. Economou,* 438 U.S. 478, 504 (1978) the Supreme Court found that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

tionary functions" are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

Defendant Weinberg's responsibilities in the processing of a claim that a child is "dependent" are prescribed by statute. The pertinent portions of Florida Statutes, Chapter 39 provide:[6]

39.04 Intake

(1) Intake shall be performed by the department of health and rehabilitative services. Any complaint that a child is dependent, delinquent, or in need of supervisions shall be made to the intake office operating in the county in which the child is found or in which the case arose. Any person or agency having knowledge of the facts may make a complaint. He shall furnish the intake office facts sufficient to establish the jurisdiction of the court and to support a finding by the court that the child is delinquent, dependent, or in need of supervision. The intake officer shall make a preliminary determination as to whether the facts presented by the complainant are legally sufficient to file a petition, consulting with the state attorney or assistant state attorney where necessary.

. . .

(d) Upon the refusal of the intake officer to file a dependency or need of supervision petition, the complainant shall be advised of his right to file a petition pursuant to § 39.05(2).

39.05 Petition

. . .

(2) All proceedings seeking an adjudication that

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[6] All references are to sections of Chapter 39 in effect November of 1977 through January of 1978. Pursuant to the "Florida Juvenile Justice Act, effective October 1, 1978, these sections were renumbered as Sections 39.403-39.405.

a child is dependent or in need of supervision shall be initiated by the filing of a petition by the state attorney, an authorized agent of the division of family services, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true.

39.06 Process and service

. . .

(2) Upon the filing of a petition containing allegations of facts which, if true, would constitute the child therein named a dependent child, or a child in need of supervision, and upon the request of the petitioner, the clerk or deputy clerk shall issue a summons.

. . .

(4) The summons shall be directed to, and shall be served upon, the following persons:

(a) The child, in the same manner as if he were an adult, when the petition alleges delinquency or need of supervision;

(b) The parents; and

(c) The legal custodians, actual custodians, and guardians ad litem, if there be any other than the parents.

. . .

(6) It shall not be necessary to the validity of a proceeding covered by this chapter that the parents or legal custodians be present if their identity or residence is unknown after a diligent search and inquiry have been made, if they are residents of a state other than Florida, or if they evade service or ignore a summons, but in this event the agent of the division of youth services, the agent of the division of family services, or other person who made the search and inquiry shall file in the case a certificate of those facts, and the judge may appoint a guardian ad litem for the child. This subsection shall not apply to a pro-

ceeding permanently to commit a child to a licensed child-placing agency or to the division of family services for adoption placement.

Kenneth Lofback, Weinberg's subordinate, refused to file the dependency petition and then, as required by Florida Statutes, § 39.04(1) (d), informed Buzzy and his father that they had a right to file their own dependency petition which Buzzy did. When Lofback called Weinberg at home to ask his advice, Weinberg agreed that Lofback had followed the correct procedures and offered to accompany Buzzy when he filed the petition. Section 39.06(2) clearly states that it is the responsibility of the individual petitioner and not the HRS, when HRS is not the petitioner, to request the clerk of the court to issue a summons to the child's parents. Thus, HRS was under no duty to notify Diana that the petition had been filed. The evidence shows that in November of 1977 Weinberg was fulfilling his duties as Intake supervisor with HRS.

Weinberg, and three other HRS employees, filed affidavits to the effect that in juvenile matters the HRS serves as an arm of the court and HRS employees have a duty to advise the judge on juvenile cases when the judge asks for assistance. Exhibits A-D, Defendant Weinberg's motion for summary judgment (December 11, 1981). The evidence shows that in January of 1978, Weinberg did no more than call Maryland to inquire whether Maryland would honor Florida child custody orders, all at the request of Judge Hosemann. Once again, Weinberg was performing one of his responsibilities as an HRS employee.

Clearly Weinberg's acts of November 1977 through January of 1978 of which plaintiff complains, fall within Weinberg's official capacity. Thus, under *Harlow v. Fitzgerald*, 73 L. Ed. 2d 396 (1982), Weinberg is entitled to

qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 410. In her lengthy amended complaint plaintiff alleges in only the most general terms why she believes that defendant Weinberg deprived her of procedural and substantive due process and equal protection. The facts show that at all times Weinberg followed the usual and customary procedures of HRS in helping Buzzy file the dependency petition and later in answering Judge Hosemann's questions. This Court finds, after reviewing all the evidence, that the material facts with regard to plaintiff's claim against defendant Weinberg are undisputed that Weinberg reasonably and in good faith, believed that he was not violating any of plaintiff's "clearly established statutory or constitutional rights." Weinberg has shown that he is entitled to the defense of qualified immunity so this Court will grant Weinberg's motion for summary judgment.

Plaintiff's claim against Buzzy apparently is based on plaintiff's allegation that Buzzy and his father, Judge Dykes "formulated a plan" to have custody of Aaron given unlawfully to Buzzy which they successfully carried to completion and the allegation that defendant Weinberg collaborated in this "plan". Obviously, without the alleged involvement of Judge Dykes and/or Weinberg, plaintiff would have no valid claim under 42 U.S.C. § 1983 because the essential element of state action would be missing.

In an en banc decision in 1979, the Fifth Circuit overruled the circuit's previous holding that private persons who conspired with state actors, themselves immune from suit under 42 U.S.C. § 1983, were entitled to derivative

immunity. *Sparks v. Duval County Ranch Co., Inc.*, 604 F.2d 976 (5th Cir. 1979) (en banc) *aff'd sub nom., Dennis v. Sparks,* 449 U.S. 24 (1980). In the present case, even if this Court had held Judge Dykes and defendant Weinberg immune, it would not by itself insulate Buzzy from liability. Buzzy may be liable if he himself acted under color of state law to deprive plaintiff of her constitutional rights and the required state action element would be satisfied if Buzzy conspired with a state official. For purposes of § 1983, a private person is engaged in a conspiracy if he "is a willful participant in joint action with the State or its agents." *Dennis v. Sparks,* 449 U.S. 24, 28 (1980).

It was alleged in *Sparks* that one defendant bribed a state judge to grant an injunction and two other defendants acted as sureties for the injunction bond. The judge granted the injunction and plaintiffs were thereby prohibited from producing certain oil. The court held that matters alleged in the pleadings were sufficient to survive a motion to dismiss. *Sparks v. Duval County Ranch Co., Inc.,* 604 F.2d 976 (5th Cir. 1979) (*en banc*) *aff'd sub nom., Dennis v. Sparks,* 449 U.S. 24 (1980). But the court cautioned that "mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss." *Id.*

In *Cole v. Gray,* 638 F.2d 804, *cert. denied,* 454 U.S. 838 (1981), another § 1983 case, the Fifth Circuit reversed the district court's denial of motions for summary judgment as to two defendants, concluding that the evidence did not support a theory of conspiracy.[7] The opinion

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[7] The Fifth Circuit authorized an interlocutory appeal from the denial of the motions for summary judgment of two defendants.

states that Alabama State Senator Jones and Alabama State Representative Holmes were members of a joint interim committee to investigate the use of federal funds in the Military Department of the State of Alabama. Plaintiff Cole was an employee of the military department and a colonel in the Alabama National Guard. The committee turned up evidence that high ranking officers in the department, including Cole, had received pay for a substantial number of extra duty days in addition to their regular salaries. The Interim Committee was then dissolved. General Gray was appointed by the governor with instructions to "clean up the mess." General Gray contacted Jones, who gave Gray a great deal of information gleaned from the committee investigation. Gray first suspended Cole and later dismissed him from his position. On appeal to the Alabama Personnel Board, Cole was reinstated. Holmes publicly stated his opposition to Cole's reinstatement. Cole filed suit alleging, among other things, that Jones and Holmes acted to deprive Cole of his position without due process. The Fifth Circuit ruled that Jones and Holmes were entitled to absolute legislative immunity only for acts taken and statements made during their service on the Interim Committee but not for actions which were outside the sphere of legitimate legislative activities and which occurred after the committee was dissolved.

Since Gray was the person who actually fired Cole, Jones and Holmes could be liable only if they conspired with Gray. The court held that:

> "the evidence does not nearly support a theory of conspiracy between Gray and the legislative defendants. Cole has shown a possible motive of personal animosity on the part of Jones, but there is not an iota of

> substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment. He has shown minimal contact between the executive and legislative defendants, with no buttressing proof of the actual nature of the information conveyed. No proof of the making or accepting of statements known to be false exists in the record. Finally, there is the discharge itself. These elements, murky allegations as to motive plus mere contact plus the fact of discharge are linked together by speculation and conclusory allegations. The evidence was wholly insufficient to raise a fact issue for trial on the conspiracy complaint."

Id. at 811.

Assuming without deciding that plaintiff in this case was deprived of certain constitutional rights, the undisputed facts fail to show that Buzzy was a "willful participant in joint action" with the other defendants. As the Fifth Circuit emphasized in *Cole,* "murky allegations . . . linked together by speculation and conclusory allegations" are not enough to allow this lawsuit to continue on to trial. But beyond that plaintiff has not shown that she was deprived of any constitutional right. It appears primarily that her claim was based on the fact that she received no notice of Buzzy's filing of the dependency petition in November of 1977 and that the petition was granted ex parte. Yet, as noted in an earlier portion of this opinion, she admitted that Buzzy told her he had obtained a court order that Aaron could not be taken out of Florida and she thereafter resided with Buzzy for several months. This Court will grant the motion for summary judgment as to Buzzy also since the undisputed facts fail to show evidence of any conspiracy as alleged.

III.

After careful consideration of the copy of the state proceedings in *Dykes v. Dykes*, as well as all pleadings, affidavits, depositions and memoranda submitted, this Court finds that there are no disputed issues of material fact and defendants are entitled to judgment as a matter of law. It is therefore appropriate to grant defendants' motions for summary judgment. Separate order will be entered in accordance herewith.

DATED in Chambers at Orlando, Florida, this 15th day of April, 1983.

/s/ George C. Young
Senior United States District Judge

Copies mailed to
counsel of record.

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 79-471-Orl-Civ-Y

DIANA CHRISTINE DYKES,

Plaintiff,

vs.

THOMAS A. WEINBERG, et al.,

Defendants.

ORDER

(Filed April 15, 1983)

In accordance with the Memorandum Opinion filed simultaneously herewith, it is

ORDERED that the motions for summary judgment filed by defendants Roger Francis Dykes, Sr., Roger Francis Dykes, Jr., and Thomas Weinberg, be and are hereby granted and this case is dismissed with prejudice.

DONE AND ORDERED in Chambers at Orlando, Florida, this 15th day of April, 1983.

/s/ George C. Young
SENIOR UNITED STATES
DISTRICT JUDGE

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APPENDIX H

Diana Christine DYKES,
Appellant,

v.

Roger Francis DYKES, Jr.,
Appellee.

No. 79-2.

District Court of Appeal of Florida,
Fifth District.

Feb. 4, 1981.

Rehearing Denied March 16, 1981.

ORFINGER, Judge.

Appellant questions a final judgment in a dissolution proceeding awarding custody of the young child of the marriage to the father. We affirm.

Appellant raises three points on appeal: (1) did the trial court abuse its discretion in awarding custody to the father instead of to the mother, (2) did the court have jurisdiction to make a custody award under the Uniform Child Custody Jurisdiction Act,[1] and (3) was there such judicial impropriety and undue influence as to prevent the trial court from rendering an independent and unbiased decision?

Disposing of the jurisdictional question first, the record clearly reveals jurisdiction in the Florida courts. The child was born in Florida on November 18, 1974, and had lived with his parents in Florida for more than a year un-

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1. Section 61.1302, et seq., Florida Statutes (Supp. 1978).

til December 15, 1975. The next six months were spent in Maryland (appellant's home) while the father was preparing to enter Pennsylvania State University; they then lived in Pennsylvania for about one and one-half years while the appellee was enrolled in the University as a full-time out-of-state student. The paternal grandparents lived in Florida, while the maternal grandparents lived in Maryland. When the marriage broke up, the father returned to Florida with the child. In awarding temporary custody to the father, the trial court found that Florida was the child's home state and that it was in the child's best interest that Florida assume jurisdiction.

Appellant insisted that Maryland was the child's home state, and after the Florida proceedings had commenced and she had not prevailed in the temporary custody hearing, she filed a dissolution proceeding in Maryland, requesting custody of the child. The Maryland court declined to exercise jurisdiction and deferred to Florida. There is substantial evidence justifying the trial court's conclusion that Florida had jurisdiction.

The child of the parties was three years old when the dissolution proceedings were filed. Appellant contends that she is a fit and proper person to have custody of her child and that under the "tender years" doctrine she should have been given preference in the custody award. She therefore asserts that the trial court abused its discretion in awarding custody to the father.

Although section 61.13(2)(b), Florida Statutes, requires that the father of the child shall be given equal consideration as the mother in awarding custody, it appears to be the law of this state that *other essential factors be-*

ing equal, the mother of an infant of tender years should receive prime consideration for custody. *Dinkel v. Dinkel,* 322 So.2d 22 (Fla.1975). In his extensive findings of fact the trial court recognized this principle, but found that the essential factors were not equal and that the "evidence militates strongly in favor of the father."

The entire voluminous record in this case has been reviewed, and if we were the triers of fact we might very well have reached an opposite result on the custody issue. Nevertheless, this does not give us the unbridled power to reverse the trial judge.

> [T]his court cannot, in any type of case, overturn the decision of a Chancellor made in the exercise of his judicial discretion in the absence of a clear showing of an abuse thereof; and, in a child custody case, the opportunity of the Chancellor to observe the demeanor and personalities of the parties and their witnesses and to feel forces, powers and influences that cannot be discerned by merely reading the record, assumes a new importance because of the many intangibles that must be evaluated in deciding the delicate question of child custody. *Grant v. Corbitt,* 95 So.2d 25, at 28.

Dinkel, 322 So.2d at 24.

Since there is competent, substantial evidence to support the findings of the trial judge, we cannot say that the trial judge abused his discretion in finding that the award of custody to the father rather than to the mother was in the best interest of the child. *Maran v. Maran,* 384 So.2d 950 (Fla. 4th DCA 1980); *Marshall v. Marshall,* 375 So.2d 1082 (Fla. 1st DCA 1979).

In an amended motion for rehearing or new trial after the final judgment, appellant contended that because ap-

pellee's father was a circuit judge in the circuit where the action was heard, and because of his alleged "intervention" in the proceedings, the appellee was not afforded justice and the ultimate custody determination was "foreordained". The fact that appellee's father was a judge in the same circuit was known to all parties and the trial judge before, during and after the trial of this cause. No change of venue was ever requested. At no time did appellant ever ask the trial judge to recuse himself or even suggest that the trial judge might be embarrassed or otherwise inhibited in his rulings.

The trial judge openly discussed the matter with the parties and their attorneys and at the beginning of the trial offered to recuse himself if either party felt that because appellee's father was a local judge a fair trial would not be had. No one took him up on that offer. There are no allegations of impropriety directed at appellee's father —only innuendos, insinuations and conclusions. Moreover, and most important in our decision, is the complete absence of any allegation or intimation that there was any attempt to influence the trial judge or that the trial judge was in fact influenced by any consideration outside of the record.

The judgment appealed from is affirmed.

AFFIRMED.

FRANK D. UPCHURCH, Jr., J., concurs.

SHARP, J., concurring in part and dissenting in part with opinion.

SHARP, Judge, concurring in part and dissenting in part.

I concur with the majority on the third issue, I agree with the result only on the second issue because of the unique circumstances in this case, and I disagree on the first issue.

Contrary to the statement in the majority opinion, Florida was not the "home" state[1] of the child at the time the custody proceeding commenced and it should have declined jurisdiction initially.[2] The parties and the child left Florida in 1976 and resided in Maryland for 6 months. Then they lived in Pennsylvania for a year and a half. The father was a student at the University and the mother worked part-time and took care of the child. Pennsylvania or possibly Maryland was the child's "home" state under the Act. *Hegler v. Hegler*, 383 So.2d 1134 (Fla. 5th DCA 1980); *Detko/Roberts v. Stikelether*, 370 So.2d 383 (Fla. 4th DCA 1979).

The father returned to Florida for a "visit" with his parents and he took the child with him for that purpose. The mother came to Florida in late November for two months, tried unsuccessfully to reconcile with the father, and unable to do so, she then returned to Maryland with the child. On November 21, 1977, without the mother's knowledge, the father appeared before the juvenile court in Brevard County, and obtained an ex parte judgment declaring that his own child was "dependent" and granting him custody.[3]

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1. § 61.1306(5), Fla.Stat. (1979).

2. § 61.1308(1)(a), Fla.Stat. (1979).

3. The circuit reheard the issue of temporary custody on February 13, 1980, when both parties were before this court. The court again granted temporary custody to the father.

Within a few days of each other the mother and father filed suits for dissolutions and sought custody of the child, she in Maryland and he in Florida. The Florida court forwarded to Maryland a "Request for Assistance" asking that court to order the return of the child to Florida for determination of the custody issue, citing as authority the highly irregular "dependency order" of the juvenile court. The Maryland court gave the Brevard dependency decree the "same effect" as a custody order of a Maryland court,[4] and based on that order alone, it declined to accept jurisdiction, and ordered the mother to return the child to the father in Florida.

The child and mother returned to Florida and the father was given temporary custody of the child. The mother filed an answer in the Florida proceeding and a counter-suit for dissolution in which she also sought custody of the child. Since Maryland, a possible "home" state, had declined to take jurisdiction, the Florida court then had discretion to proceed under section 61.1308(1)(d)1 of the Act, and subject matter jurisdiction attached.

I disagree with the majority on the first issue because I think this case is in conflict with *Anderson v. Anderson,* 309 So.2d 1 (Fla.1975) and *Dinkel v. Dinkel,* 322 So.2d 22 (Fla. 1975). At the time of this proceeding, the child was three years old, and prior to the separation of the parties, the mother had assumed the primary role in his care. She was not shown to be an improper or uncaring parent in any way.

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4. In point of fact it gave the Brevard decree far more effect than a Florida court would have, since it was clearly improper on its face.

The trial court stated that it was aware of the "tender years" doctrine, but in this case it found the scales balanced heavily in favor of the father. Normally the trial court's conclusions in custody matters should not be disturbed. *In Re Gregory,* 313 So.2d 735 (Fla.1975); *Johnson v. Johnson,* 293 So.2d 770 (Fla. 1st DCA 1974). However the factors used by this trial court to weight the scales in the father's favor are in my opinion insufficient.

Early in the proceedings the trial court said the mother had been the more stable parent. But at the final hearing the judge chastized her because she indicated she wanted to return to her home in Maryland, work part-time while living with her parents, and work towards her college degree. The court said the mother's goal demonstrated "a lack of purpose" in her life. But this is precisely the manner and life style the father had been living during the time he had temporary custody of the child; and he stated a similar plan for his future.

The trial court stated it was reluctant to see Florida lose jurisdiction over the child as it would if the child were returned to Maryland. Surely the day has come when Florida courts recognize that sister states also have effective legal systems and the departure of a child from our borders does not expose him to automatic danger.

The trial court also weighed and considered the relative merits of the paternal and maternal grandparents. and determined the paternal grandparents were superior. Both father and mother are young people who have not completed their educations, and they will require some help from their own parents. I question whether weighing the grandparents is ever a proper basis upon which to make

a custody award,[5] but even if it is, the record completely fails to show that the mother's family is any less able, stable or willing to provide this backup support than the father's.

Finally, the trial court noted the "improvement" the child had made since he was placed in the father's temporary custody in Florida. The custody litigation in Florida consumed more than a year's time. The child needed a "stable" environment, and he had been upset by the marital discord and being snatched back and forth between parents. However, the growth and progress of a child between the ages of three and four is normally rapid and dramatic. The parent who has temporary custody should not be credited automatically with this natural progress when it is not clear similar progress would not be made with the other parent, particularly where the temporary custody was obtained under such questionable circumstances.

The record in this case does not balance heavily in favor of either parent;[6] and since the "tender years" doctrine is apparently still the law in Florida, the mother should have been given permanent custody of this child. *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973).

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5. *Cf. Robinson v. Robinson,* 333 So. 2d 526 (Fla. 2d DCA 1976) (grandparents living nearby not controlling).

6. During the custody hearing, the judge stated several times that the mother and father were equally fit persons to have custody. *See* Record pp. 843, 853.